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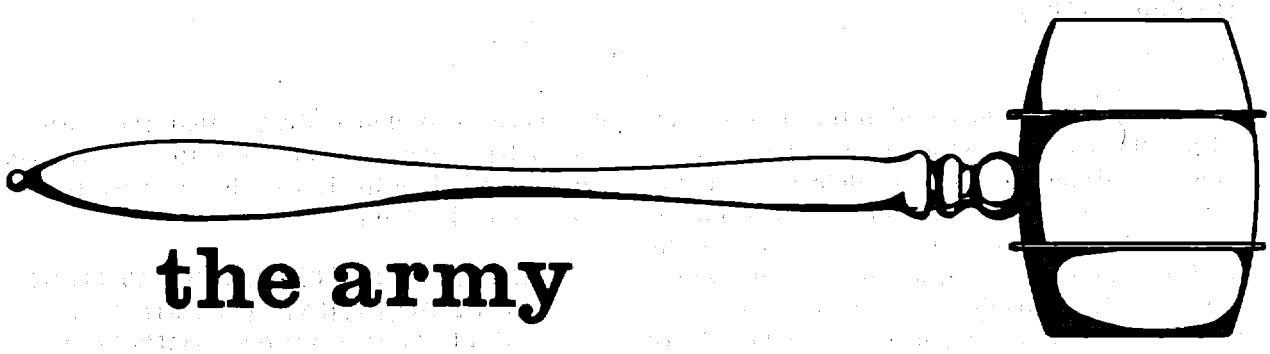

the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-97

January 1981

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Impeachment by Prior Conviction: Military Rule of Evidence 609

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INTRODUCTION

Reduced to its basic components, an advocate's role at trial is to present his case in a clear, concise and believable manner. This means being able to effectively *communicate* his client's "story," and then being able to *sell* that story to the court. This result involves considering many legal and practical matters. One of the most important is witness credibility; that is, will the finders of fact believe what your witnesses say, and what you suggest in argument. No matter how accurate your facts are, if they are not believed the case will be lost.

The Military Rules of Evidence provide several mechanisms for testing credibility.[1] The

[1] *See* Mil. R. Evid. 404—Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes. Mil. R. Evid. 405—Methods of Proving Character. Mil. R. Evid. 406—Habit; Routine Practice. Mil. R. Evid. 412—Non Consentual Sexual Offenses; Relevancy of Victim's Past Behavior. Mil. R. Evid. 607—Who May Impeach. Mil. R. Evid. 608—Evidence of Character Conduct, Bias of Witness. Mil. R. Evid. 612—Writing Used to Refresh Memory. Mil. R. Evid. 613—Prior Statements of Witnesses. Mil. R. Evid. 801(d)—Statements Which are Not Hearsay. Mil. R. Evid. 804(b)—Hearsay Exceptions. Mil. R. Evid. 806—Attacking and Supporting Credibility of Declarant.

one which will be addressed in this article deals with evidence of a witness's previous convictions. Of all impeachment evidence, proof that a witness has been convicted of a crime is perhaps the most devastating. This is partially so for social and pragmatic reasons which transcend jurisprudential concerns. An emotional cord is struck when court-members learn that a witness has previously been convicted of an offense. The more serious the crime, the less credibility/believability will be attached to the testimony. Traditional common law authority recognized this reality, and provided for it. As a result, evidence of a previous conviction could be used to attack a witness, but only for the purpose of demonstrating that the witness should not be believed. The evidence could not be used to prove that the witness was a bad person, had a criminal disposition or character, and, particularly with respect to the accused himself, could not be offered to show that the accused was more likely to commit the charged offense because he had committed a previous one.

To a large extent Military Rule of Evidence 609 (hereinafter referred to as MRE 609) adopts these philosophies. The new Rule allows evidence of a previous conviction to be admitted because it demonstrates that the witness has a bad character, and a witness with bad character is less likely to tell the truth than a witness with good character.[2]

QUALIFYING CRITERIA—WHAT MUST BE DEMONSTRATED BEFORE A CONVICTION CAN BE ADMITTED

Before evidence of a previous conviction is admissible counsel must demonstrate that it meets certain qualifying criteria. MRE 609 changes many of the previous *Manual's* provisions in this area. In order to place the new Rule in proper perspective, a brief examination of that authority is provided.

Prior to 1 September 1980, paragraph 153*b* of the Manual for Court-Martial governed impeachment by prior conviction. It provided that convictions for offenses involving moral turpitude or otherwise affecting credibility could be used to impeach. This included court-martial convictions which under the Table of Maximum Punishments[3] were punishable by a dishonora-

[2]*See* J. Weinstein and M. Burger, Weinstein's Evidence, 609–56 (1978).

[3]Para. 127, Manual for Courts-Martial, 1969 (Rev. Ed.).

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The Army Lawyer (ISSN 0364-1287)

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ble discharge or confinement in excess of one year; federal felony convictions punishable by a confinement for more than one year; convictions by other courts for an offense similar to federal offenses punishable as felonies, and convictions for offenses involving fraud, deceit, larceny, wrongful appropriation or the making of false statements. The fact of conviction could be established by an admissible record of the conviction or by cross-examination of the witness.

Rule 609[4] provides two methods for establishing the fact of conviction. The public record of the conviction may be offered or it may be established on cross-examination. When the government seeks to impeach the accused on cross-examination it "may ask about the name of the crime, the time and place of conviction and the punishment."[5]

Rule 609(a)[6] permits impeachment through the use of two different categories of offenses. First, convictions for offenses punishable by death, dishonorable discharge or imprisonment in excess of one year are admissible to impeach if the military judge determines that the probative value of admitting the evidence outweighs the prejudicial effect to the accused. Second, convictions for offenses involving dishonesty or false statement may be used to impeach regardless of the maximum punishment.

Whether an offense meets the punishment criteria of Rule 609(a)(1) is determined by the law under which the witness is convicted. Thus whether a state court conviction for an offense is punishable by imprisonment in excess of one year is determined by examining the state penal code under which the conviction was obtained. Similarly, the punishment criteria for a federal conviction is determined by an examination of the United States Code. Whether the action of a trial court is in fact a conviction is also determined by the law of the jurisdiction under which the trial is held. Thus where a state determines that action under its deferred judgment statute or under its Youthful Trainee Act does not amount to a conviction, the proceedings may not be used to impeach pursuant to Rule 609.[7]

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[4] Rule 609 of the Military Rules of Evidence and Federal Rule of Evidence 609 are essentially the same rule. The only changes made by the military drafters are those which refer to peculiarly military practices. For example, the military rule makes specific reference to a dishonorable discharge and to the various types of court-martial. However it is clear that the intent of the drafters is that the Federal interpretation be identical to the military interpretation. *See* App. 18, Rule 609, Manual for Courts-Martial, 1969 (Rev.Ed.).

Accordingly throughout this article and except as otherwise indicated the federal interpretation is assumed to refer to the military rule as well as to the federal rule.

[5] United States v. Boyce, 611 F.2d 530 (4th Cir. 1979). Generally an accused should not be cross-examined about a prior conviction unless the trial counsel is in possession of an admissible record of that conviction. United States v. Russell, 14 C.M.R. 114 (C.M.A. 1954). When the trial counsel has a reasonable and good facts belief that the accused has been convicted of a crime which can be used to impeach he should be able to inquire about that crime in a non-accusatory manner. However if the trial counsel is not in possession of an admissible record of the conviction, he is bound by the accused's answer. An inquiry into a conviction when the prosecutor knows or should know that no such conviction exists is prejudicial error. United States v. Yarbrough, 352 F.2d 491 (6th Cir. 1965).

[6] (a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or (2) involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial. Mil. R. Evid. 609(a).

[7] United States v. LeBlanc, 612 F.2d 1012 (6th Cir. 1980); United States v. Parker, 604 F.2d 1327 (10th Cir. 1979). A conviction under the Youth Corrections Act, 18 U.S.C. §§ 5005–26 is admissible under Rule 609. United States v. Ashley, 569 F.2d 975 (5th Cir. 1978). The admissibility for impeachment purposes of a summary court-martial conviction is questionable. Compare the opinions of Chief Judge Everett and Judge Cook in United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

The convicition[8] sought to be introduced is not limited to that adjudged in an American court nor need it be from a court operating under the common law system. Thus in *United States v. Wilson*[9] the government was permitted to impeach the accused with a prior rape conviction obtained in a German court.[10]

Once the fact of conviction is established and the punishment criteria of Rule 609(a)(1) are met the conviction may be used to impeach a witness only if the military judge determines that the probative value of the evidence outweighs its prejudicial effect to the accused.

> The addition of the phrase "to the [accused]" at the end of Rule 609 (a)(1) reflects a deliberate choice to regulate impeachment by prior conviction *only* when the *defendant's* interests might be damaged by admission of evidence of past crimes, and not where the prosecution might suffer, or where a non-defendant witness complains of possible loss of reputation in the community.[11]

Thus when the government seeks to impeach a defense witness with his prior conviction, any disgrace or infamy the witness would suffer as a result of the use of such evidence is irrelevant. The prejudicial effect considered is only that which the accused will suffer as a result of the impeachment of the defense witness.[12]

Although by its terms Rule 609 applies to all witnesses including the accused, the protection against unfair prejudice of the Rule 609(a)(1) balancing test refers only to the defense case. Therefore when the defense seeks to impeach a government witness with a prior conviction the government should not be permitted to utilize this balancing test—that the probative value of the evidence must outweigh the prejudice to the government's case. Rather the government should be compelled to utilize the more stringent balancing test of Rule 403[13] which requires the opponent of the evidence to establish that the prejudice to its case substantially outweighs the probative value of the evidence.

Consideration of the Rule 609(a)(1) balancing test requires a determination of which party bears the burden of proof. The question was considered by the Court of Military Appeals in *United States v. Weaver*,[14] In *Weaver*, a prosecution for robbery, assault and AWOL, the government used a nine year old burglary conviction to impeach the accused. Weaver was tried before the adoption of the Federal Rules

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[8] Although there must be a conviction under the law of the jurisdiction in which the trial was held, the conviction need not be final. Thus unlike the previous Manual provision, Para. 153(b), Manual for Courts-Martial, 1969 (Rev. Ed.), which prohibited the use of such convictions until final affirmance under the Uniform Code of Military Justice was accomplished, most court-martial convictions may be used for impeachment purposes once a sentence is adjudged. *See* discussion of Rule 609(e) and (f) *infra*.

[9] 556 F.2d 1177 (4th Cir. 1977).

[10] In United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979), the court opined that a conviction obtained in an Iranian court could be used to impeach. The court stated, *inter alia* that "the burden was on the defendant to demonstrate why the lack of due process in obtaining the foreign conviction was so unfair that it could not be used for impeachment." 592 F.2d at 90. Query: whether the same result would obtain today? A conviction obtained in a British court may be used to impeach. United States v. Miller, 1 M.J. 798 (A.F.C.M.R. 1976).

[11] United States v. Smith, 551 F.2d 348, 359 (D.C. Cir. 1976) (emphasis in original).

[12] H.R. CONF. REP. NO. 93-1597, 93d Cong., 2d Sess. *reprinted in* (1974) U.S. CODE CONG. & AD NEWS 7098, 7103. The Committee stated "[t]he danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a non-defendant witness is outweighed by the need for the triers of fact to have as much relevant evidence on the issue of credibility as possible." The lack of concern for the non-accused witness is in marked contrast to the protection afforded to victims of non-consensual sexual offenses by Mil. R. Evid. 412. That rule, which has its genesis in the Privacy Protection for Rape Victims Act of 1978, Public Law 95-450, severely limits the admissibility of evidence relating to the past sexual behavior of the victim.

[13] Mil. R. Evid. 403.

[14] 1 M.J. 111 (C.M.A. 1975).

of Evidence, and the Court of Military Appeals rendered its decision prior to that date.[15]

Nevertheless, the court adopted the balancing test of the proposed Federal Rule of Evidence 609(a)(1) as the standard to be utilized in military practice and stated that for convictions that are less than 10 years old "the accused has the burden of persuasion to show that the prejudicial effect of impeachment outweighs the probative value of the prior conviction to the issue of credibility."[16]

The language of the balancing test and its interpretation by the Federal Courts suggests that the Court of Military Appeals interpretation is erroneous. The Rule itself requires that a conviction will not be admitted unless the probative value *outweighs* the prejudicial effect. *Weaver* reverses this language and requires admissibility unless the prejudice outweighs the probative value.

The Federal Courts also place the burden on the government. In *United States v Smith*[17] the District of Columbia Circuit made a detailed examination of Rule 609 and concluded that the Rule shifted "to the prosecution the burden of demonstrating that probative value on the issue of credibility outweighs prejudicial effect to the defendant."[18] Similarly in a more recent case,[19] the Ninth Circuit held that "Rule 609(a)(1) placed the burden of persuasion on the prosecutor and admission is conditioned upon probative value outweighing prejudice."[20]

Since *Weaver* is in conflict with the interpretation followed in the Federal Courts and at odds with the wording of the Military Rule and since the promulgation of the Rule is within the power of the President[21] it appears that the *Weaver* interpretation should no longer be followed.

To satisfy its burden the government must do more than merely establish that a conviction is less than 10 years old. In *United States v. Figueroa*[22] the issue was the admissibility of a prior conviction of the accused offered pursuant to Rule 404(b)).[23] The judge analogized the issue to a 609(a) ruling and held that since a

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[15] The Federal Rules of Evidence were signed into law on 2 January 1975 and became effective on 1 July 1975.

[16] United States v. Weaver, 1 M.J. 111, 117 (C.M.A. 1975). The holding in Weaver remains the law in the military. *See* United States v. Cobb, 9 M.J. 786, 788 (A.C.M.R. 1980) where the court cited *Weaver* and found that the defense had "not met the burden of persuasion cast upon it by *Weaver*."

[17] 551 F.2d 348 (D.C. Cir. 1976).

[18] 551 F.2d at 361.

[19] United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980).

[20] 614 F.2d at 653. *See* United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976) where the court stated "that Rule 609 places the burden of proof on the government." *Accord* United States v. Gross, 603 F.2d 757 (9th Cir. 1979).

In United States v. Vanderbosch, 610 F.2d 95 (2d Cir. 1979) the court stated "this circuit has repeatedly held that the defendant is required to show that the prejudicial effect outweighs probative value at the time the motion is made to suppress the prior conviction." The court cited three cases for the proposition. One of them, United States v. Costa, 425 F.2d 950 (2d Cir. 1970) is a pre-rules case which contains no citation to the proposed federal rules of evidence. In United States v. Reed, 572 F.2d 412 (2d Cir. 1978), the second case cited in *Vanderbosch*, the court refused to consider the 609(a)(1) issue because it was not raised at the trial level. The opinion does not place the burden of proof on the accused.

In the third case, United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979) the burden was placed on the defense. For its authority the court cited United States v. Brown, 476 F.2d 933 (D.C. Cir. 1973) which in turn relied on the landmark case of Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). However as the District of Columbia Circuit stated in United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) and reiterated in United States v. Crawford, 613 F.2d 1045 (D.C. Cir. 1979), "Congress clearly intended to change prior case law (including this court's *Luck* and *Gordon* decisions) and shift the burden of proof in establishing the admissibility of prior convictions from defendants to the government." 613 F.2d at 1053. Accordingly, it appears that the statement in *Vanderbosch* is incorrect and should not be considered as persuasive authority.

[21] *See* Uniform Code of Military Justice, Art. 36, 10 U.S.C. § 836 *as amended*.

[22] 618 F.2d 934 (2d Cir. 1980).

[23] Fed. R. Evid. 404(b).

conviction less than 10 years old was admissible under Rule 609 it would be admissible in this case. The appellate court reversed stating that while the age of a conviction should be considered in determining admissibility, "satisfying the ten-year provision of Rule 609 does not justify the automatic admission of a prior conviction under that rule."[24]

Some of the factors which must be considered applying the balancing test are set out in *United States v. Weaver.*[25]

a. *The nature of the conviction in terms of its bearing on veracity.* An offense involving moral turpitude such as larceny or wrongful appropriation generally is more probative on the issue of credibility than a crime of violence such as an assault. Thus an offense which more closely indicates a lack of credibility is more likely to be admitted for purposes of impeachment than an offense where the affect on credibility is remote.[26]

b. *The age of the conviction.* A conviction more closely related in time to the date of the witness' testimony is likely to be more probative than one significantly older. Thus a 1 year old conviction has more of an effect on credibility than an 8 or 9 year old conviction for a similar offense.[27]

c. *The propensity to improperly influence the members.* When the government offers evidence for impeachment purposes showing that the accused has previously been convicted of an offense identical to the one for which he is on trial, it is likely that the members would conclude that the accused was guilty because if he did it once, he probably did it again. Therefore, the more similar a prior offense is to the offense charged the more likely it would improperly influence the members and the more likely it would be excluded. Similarly the more dissimilar the offense, the more unlikely it would improperly influence the members.[28]

d. *The necessity for the testimony of the accused in the interests of justice.* A situation may arise in which the accused must testify in order that his case be properly presented and that he be afforded a fair trial. However, the effect of his prior conviction might be so devastating to his case that he would remain silent and thereby not be able to adequately present his case. "For instance, where an instruction relative to inferences arising from the unexplained possession of recently stolen property is permissible the importance of an accused's testimony becomes more acute."[29] In such a case the government might be foreclosed from using the prior conviction.

e. *The criticality of the credibility question.* The closer the case comes to a proverbial swearing match where the question of guilt or innocence becomes one of whom do you believe, the more important it is for the members to be given evidence upon which they can judge the credibility of witnesses. In such cases it is more

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[24] United States v. Figueroa, 618 F.2d 942 (2d Cir. 1980).

[25] 1 M.J. 111, 118 (C.M.A. 1975). Similar lists of factors are set out in United States v. Hawley, 554 F.2d 50 (2d Cir. 1977) and United States v. Mahone, 537 F.2d 922 (7th Cir. 1976).

[26] *See* United States v. Weaver, 1 M.J. 111, 118, n. 6 (C.M.A. 1975). *Compare* United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980) (conviction for receiving stolen property probative on the issue of veracity) *with* United States v. Jackson, 405 F. Supp. 938, 942 (E.D.N.Y. 1975) ("prior assaultive conduct would seem to have little bearing on the likelihood that one will tell the truth").

[27] *See* United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980); United States v. Crawford, 613 F.2d 1045, 1052 (D.C. Cir. 1979); United States v. Weaver, 1 M.J. 111, 118, n. 7 (C.M.A. 1975).

[28] *See, e.g.*, United States v. Lewis, 626 F.2d 940, 949, n. 13 (D.C. Cir. 1980); United States v. Bazemore, SPCM 14272 (A.C.M.R. 9 Apr. 1980) (unpub.).

[29] United States v. Weaver, 1 M.J. 111, 118, n. 9 (C.M.A. 1975).

likely that evidence of prior convictions would be admissible.[30]

An unresolved but disputed issue in Rule 609(a)(1) litigation concerns the timing of counsel's objection to potentially inadmissible convictions. Obviously the matter can be litigated at the time the prior conviction is offered. However litigation at that point presents several problems. First, an Article 39(a) session will probably be required, thereby interrupting the orderly flow of the trial. Second, and more important, the defense will be required to call its witness without knowing whether the prior conviction can be utilized to impeach, and therefore be unable to make a knowing choice in deciding whether to call the witness. The problem is especially acute when the witness is the accused.

One answer to the defense dilemma and the disruption question is the motion *in liminie.*[31] However, the cases are in conflict with respect to the use of the motion. In *United States v. Jackson,*[32] Judge Weinstein held that there is a policy of encouraging the accused to exercise his right to testify. Therefore:

> trial courts should rule on the admissibility of prior crimes to impeach as soon as possible after the issue has been raised . . . . It is only after the admissibility of a conviction has been ruled on that defense counsel can make an informed decision whether to put his or her client on the stand. In addition, the court's ruling may have a significant impact on opening statements and the questioning of witnesses.[33]

Accordingly he permitted the issue to be litigated by a motion *in liminie* and excluded the conviction. However, he recognized "the policy of protecting the government's case against unfair misrepresentation of an accused's noncriminality."[34] Therefore, he placed two conditions on his exclusion order. If the accused testified he had never been in trouble with the law or if the defense attempted to impeach a government witness with a conviction for an offense similar to the excluded offense, the government would be permitted to utilize the accused's prior conviction.

Shortly after *Jackson,* the Eighth Circuit decided *United States v. Johnston*[35] in which it held that the accused "was not entitled to an advance order barring impeachment use of these prior convictions in the event he took the stand."[36] Moreover until he took the stand," the court had no duty to rule on his pretrial motion regarding the admissibility of evidence of his prior convictions for purposes of impeachment."[37]

More recently the Army Court of Military Review considered this issue in *United States v. Cofield.*[38] In that case the military judge, at the request of the defense, rendered an advisory opinion that a summary court-martial conviction was admissible to impeach the accused if he testified. The accused did not testify, but on appeal claimed the opinion of the judge was error and improperly affected the accused's right to testify. In affirming the court found that the defense argument was based on assumptions that the advisory opinion caused the accused to remain silent; that the accused's testimony would have resulted in a different outcome of the trial; and that the conviction would have been offered and admitted at the trial. The appellate court refused to make these as-

[30] *See, e.g.,* United States v. Jackson, 627 F.2d 1198, 1209 (D.C. Cir. 1980); United States v. Barnes, 622 F.2d 107, 109 (5th Cir. 1980); United States v. Lamb, 575 F.2d 1310, 1314 (10th Cir. 1978).

[31] Generally these are motions made during the initial Article 39(a) session for the purpose of excluding "prejudicial matter from consideration by court members." For an excellent discussion of these motions *see* Siano, "Motions *in liminie,* An Often Neglected Common Law Motion," *The Army Lawyer,* January 1976.

[32] 405 F. Supp. 938 (E.D.N.Y. 1975).

[33] 405 F.Supp. at 942.

[34] 405 F.Supp. at 942.

[35] 543 F.2d 55 (8th Cir. 1976).

[36] 543 F.2d at 59.

[37] 543 F.2d at 59.

[38] CM 438090 (A.C.M.R. 29 Jan. 1980) (unpub), *petition granted,* 9 M.J. 204 (C.M.A. 1980).

sumptions. While not specifically stating so, the court's ruling casts doubt upon the efficacy of motions *in liminie*.[39]

It is submitted that the better reasoned view is found in *United States v. Cook*.[40] There the court recognized the problems inherent in the use of motions *in liminie* including the assumptions referred to in *Cofield* and the very real problem of ascertaining the testimony of the proposed witness. However the court found that "motions *in liminie* have proven their value in litigation. They save jury time and avoid the waste that sometimes results from haste when side-bar matters have to be used in the course of trial."[41] Accordingly it held that motions *in liminie* were a sound method of litigating Rule 609 issues. To satisfy the competing interests and the previously mentioned problems of this motion practice the Court held that in order to properly present a Rule 609 motion *in liminie* the

> defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court can do the necessary balancing contemplated in Rule 609.[42]

Adoption of the *Cook* formula by the military would enhance trial procedure, protect the accused's right to testify and do no violence to the government's case.[43]

Regardless of whether the 609(a)(1) issue is litigated by a motion *in liminie* in a pretrial or Article 39(a) session, or as an objection at the time the evidence is offered, questions remain as to whether a hearing should be held, how extensive the hearing should be and how detailed the judge's ruling must be. The leading case is *United States v Mahone*.[44] Mahone was tried for possession of a sawed off shotgun not registered to him and not identified by a serial number. The judge denied a motion *in liminie* to prevent the government from using the appellant's prior robbery conviction as impeachment evidence. On appeal the defense claimed that the trial judge erred by not making an explicit determination on the record that the probative value of the evidence outweighed its prejudicial effect. The court affirmed, finding that the record demonstrated that the judge properly applied the balancing test of Rule 609(a)(1). To avoid future unnecessary litigation the court urged:

> trial judges to make such determinations after a hearing on the record . . . . and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value . . . . The judge should require a brief recital by the government of the circumstances surrounding the admission of the evidence and a statement of date, nature and place of the conviction. The defendant should be permitted to rebut the government's presentation, pointing out to the court the possible prejudicial effect to the defendent if the evidence is admitted.[45]

If the *Mahone* advice is adopted there should be no doubt that the trial judge properly fol-

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[39] In United States v. Harris, 27 C.M.R. 143 (C.M.A. 1958) the court treated the issue as a hypothetical question which was not properly raised and preserved in the trial court.

[40] 608 F.2d 1175 (9th Cir. 1979).

[41] 608 F.2d at 1186.

[42] 608 F.2d at 1186. An application of the *Cook* procedure may be found in United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980). *But cf.* United States v. Lutz, 621 F.2d 940 (9th Cir. 1980) where the court refused to entertain a motion *in liminie* in a Rule 404(b) situation.

[43] It is recognized that often an intelligible ruling on a motion *in liminie* cannot be made because the judge has not had an adequate opportunity to evaluate the evidence. *See, e.g.*, United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980). However where the judge is able to properly assess the evidence he should rule on the motion. *See* United States v. Jackson, 405 F.Supp. 938, 942 (E.D.N.Y. 1975).

[44] 537 F.2d 922 (7th Cir. 1976).

[45] 537 F.2d at 929. A description of such a hearing may be found in United States v. Jackson, 627 F.2d 1198, 1208 (D.C. Cir. 1980).

lowed the dictates of Rule 609(a)(1) after giving both sides the opportunity to present its case.

United States v. Crawford[46] represents the other side of the coin and illustrates what can occur when a proper hearing is not held. In that case the government was allowed to ask the accused if she had previously been convicted of shoplifting. The judge permitted the question and made no reference to the 609(a)(1) balancing test. Indeed the Court of Appeals originally reversed and remanded because "none of the participants—court, prosecutor or defense counsel—exhibits any visible awareness of the fact that impeachment by prior conviction is governed by Rule 609."[47] On remand the trial judge did not inquire as to the nature of the conviction but merely stated the probative value outweighed the prejudice. The Court of Appeals again reversed. It held that a "full fledged hearing followed by an explanation in defense of its decision"[48] is not required in every case. However, there must be some inquiry into the circumstances of the commission of the offense so that at the very least the court will be able to determine whether the offense is probative of a lack of veracity.

As long as some hearing is held and the record demonstrates the proper legal standard was applied, it is likely that the trial judge's ruling will be upheld.[49] However, the Fifth Circuit requires more.[50] In addition to applying the proper rule the trial judge must "make an on-the-record finding that the probative value of admitting a prior conviction outweighs its prejudicial effect."[51]

Rule 609(a)(2) is significantly different than 609(a)(1). There is no balancing test in this part of the Rule and the punishment for the offense is irrelevant. If a conviction for a crime involving dishonesty or false statement is offered to impeach, it is automatically admissible.[52] The "rule . . . grants no judicial discretion for" its exclusion.[53]

> . . . [T]he phrase dishonesty and false statement . . . means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.[54]

"Congress clearly intended the phrase to denote a fairly narrow subset of criminal activity . . . . Even in its broadest sense the term *crimen falsi* has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth."[55] The federal courts have given effect to Congress' intent and have given a very narrow construction to the category of offenses admissible under this rule. Accordingly convictions for offenses such as petty theft,[56] shop-

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[46] 613 F.2d 1045 (D.C. Cir. 1979).

[47] United States v. Dorsey, 591 F.2d 922, 933 (D.C. Cir. 1978).

[48] United States v. Crawford, 613 F.2d 1045, 1050 (D.C. Cir. 1979).

[49] *See, e.g.*, United States v. Hawley, 554 F.2d 50 (2d Cir. 1977); United States v. Mahone, 537 F.2d 922 (7th Cir. 1976).

[50] United States v. Preston, 608 F.2d 626 (5th Cir. 1979).

[51] 608 F.2d at 639.

[52] United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976); United States v. Hawley, 554 F.2d 50 (2d Cir. 1977).

[53] United States v. Field, 625 F.2d 862 (9th Cir. 1980). *See* United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978).

Although it appears that the Rule 403 balancing test should not apply to Rule 609(a) issues the court in Field and at least one other have mentioned the possibility without deciding the question. 625 F.2d at 871, n.5; United States v. Papia, 560 F.2d 827, 845 n. 10 (7th Cir. 1977).

[54] H.R. CONF. REP. NO. 93-1597, 93d Cong., 2d Sess., *reprinted in* (1974) U.S. CODE CONG. & AD NEWS 7098, 7103. *See* United States v. Smith, 551 F.2d 348, 362 (D.C. Cir. 1976).

[55] United States v. Smith, 551 F.2d 348, 362-63 (D.C. Cir. 1976); *accord* United States v. Fearwell, 595 F.2d 771 (D.C. Cir. 1978).

[56] United States v. Fearwell, 595 F.2d 771 (D.C. Cir.

lifting,[57] prostitution,[58] burglary,[59] robbery,[60] receiving stolen property[61] and narcotics trafficking[62] have been held to be inadmissible for impeachment under Rule 609(a)(2).[63]

Even though an offense is not one which would normally be characterized as involving dishonesty or false statement and therefore automatically admissible under rule 609(a)(2), if the commission of the offense was based on fraudulent or deceitful conduct the conviction may be admissible under that section. In *United States v. Papia*[64] cross-examination of the accused revealed that he had previously been convicted in federal court for the misdemeanor offense of theft of less than $100. On appeal the accused claimed it was error for the government to use this conviction to impeach him. The Court of Appeals affirmed. Initially the court found that a conviction for larceny or theft was not within the term dishonesty because as used in the Rule it means "something more than a man's propensity to steal what does not belong to him."[65] Nevertheless, the court opined that "a theft conviction may well be based on fraudulent or deceitful conduct"[66] and if the offense was so commited it would be admissible under Rule 609(a)(2). In the trial court, the government had established that the original charge involved forgery and was plea bargained down"[67] to the misdemeanor. Therefore, the government as the proponent of the evidence, carried its burden of establishing that the offense involved dishonesty or false statement and was admissible to impeach.

The methodology adopted by the court in *Papia*—that if the method of commission of the offense involved dishonesty or false statement the conviction was admissible to impeach—has been given wide application.[68] Recently, however, the District of Columbia Circuit has attempted to curtail the Papia approach. In *United States v. Lewis*,[69] the government attempted to impeach the accused under Rule 609(a)(2) with a conviction for heroin distribution. The government argued "that he who lives by surreptitiously selling drugs on the street to innocent members of the community engages in a crime involving dishonesty."[70] The court rejected the government position stating "we do not perceive that it is the *manner* in which the offense is committed that determines its admissibility. Rather we interpret Rule 609(a)(2) to require that the crime involved dishonesty or false statement as an *element* of the statutory offense."[71] Thus only if the statutory crime includes dishonesty or false statement as an essential element will the conviction be admissible under the Rule.

Although the government position was not well taken and would do violence to the Con-

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1978); Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976).

[57] United States v. Entrekin, 624 F.2d 597 (5th Cir. 1980); United States v. Ashley, 569 F.2d 975 (5th Cir. 1978); *see* cases cited in United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978).

[58] United States v. Walker, 613 F.2d 1349 (5th Cir. 1980).

[59] United States v. Seamster, 568 F.2d 188 (10th Cir. 1978).

[60] United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980); United States v. Preston, 608 F.2d 626 (5th Cir. 1979); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); United States v. Mahone, 537 F.2d 922 (7th Cir. 1976).

[61] United States v. Field, 625 F.2d 862 (9th Cir. 1980).

[62] United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980); United States v. Gross, 603 F.2d 757 (9th Cir. 1979).

[63] Merely because a conviction does not meet the automatic admission prerequisites of Rule 609(a)(2) does not mean that it cannot be used. The conviction may still be admissible under Rule 609(a)(1).

[64] 560 F.2d 827 (7th Cir. 1977).

[65] 560 F.2d at 846.

[66] 560 F.2d at 847.

[67] 560 F.2d at 847.

[68] *See, e.g.*, United States v. Barnes, 622 F.2d 107 (5th Cir. 1980); United States v. Cathey, 591 F.2d 268, 275, n. 16 (5th Cir. 1979); United States v. Seamster, 568 F.2d 188 (10th Cir. 1978); Virgin Islands v. Toto, 529 F.2d 278, 281 n. 3 (3d Cir. 1976).

[69] 626 F.2d 940 (D.C. Cir. 1980).

[70] 626 F.2d at 946.

[71] 626 F.2d at 946 (emphasis in original).

gressional intent to make Rule 609(a)(2) one of narrow application, the court's explanation of its ruling is less than fully satisfactory. The basic consideration on the issue of admissibility is whether the conviction indicates the strong likelihood that the witness would testify untruthfully.[72] If the conviction establishes this likelihood it should be admissible and it is irrelevant that the likelihood is established by a statutory element or by the manner of commission of the offense. The *Lewis* court considered offenses which have no particular relationship to veracity, and failed to follow established precedents. Its reasoning was in effect *dicta*. Therefore, it should not be considered as persuasive authority for the interpretation of Military Rule 609(a)(2).

Rule 609(b)[73] provides that convictions in which more than ten years have elapsed from the date of conviction or the date of release from confinement, whichever is later, are admissible for impeachment. However the judge must determine that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. The party seeking to use such a conviction must give advance written notice of its intent in order to give the opposing party "a fair opportunity to contest the use of such evidence."

The Rule applies to all convictions which meet the ten year requirement. Thus the admissibility of all convictions, misdemeanors and felonys alike, and those involving dishonesty or false statement are subject to the requirements of Rule 609(b).

There are substantial differences between sections 609(a) and (b). First, as noted, there is no automatic admissibility exception for offenses involving dishonesty and false statement. Second, the balancing tests of the sections vary. In 609(a) the conviction is admissible if its probative value outweighs the resultant prejudice to the accused's case. In 609(b) there is no special rule to protect the defense and both parties may take equal advantage of the Rule. More importantly the balance in favor of probative value must be *substantial* rather than a mere outweighing of prejudice. Unless the probative value clearly outweighs prejudice, the prior conviction is inadmissible. Thus in close cases the result will normally be exclusion because there is a presumption against admissibility.[74]

Unlike 609(a), 609(b) requires that "specific facts and circumstances support" any ruling in favor of admissibility. At least two Circuits have held that this language requires the judge to make special findings on the record when admitting a conviction under the rule. In *United States v. Cavender*,[75] the trial judge, without explanation, denied the defense motion to prohibit the government from impeaching the accused with convictions which were more than ten years old. The circuit court reversed. The court examined the legislative history of Rule 609(b) and adopted the Senate Report[76] as the accurate reflection of Congressional intent. That report stated that the Rule requires "the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially out-

[72] *See, e.g.*, United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980); United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978); United States v. Seamster, 568 F.2d 188, 190 (10th Cir. 1978).

[73] (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. Mil. R. Evid. 609(b).

[74] United States v. Cathey, 591 F.2d 268 (5th Cir. 1979).

[75] 578 F.2d 528 (4th Cir. 1978).

[76] S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974) *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051.

weighs its prejudicial impact."[77] Since there was no delineation on the record of the specific facts, circumstances and reasons for the ruling of the trial judge, the ruling could not be sustained.

In *United States v Mahler*[78] the Second Circuit found four reasons for requiring on the record special findings: (1) the language of the Rule clearly requires that "the basis of the ruling . . . [be] . . . carefully spelled out;"[79] (2) the legislative history of the Rule *i.e.*, the Senate report, mandates such a requirement; (3) "the case law while not entirely consistent assumes that Rule 609(b) requires an on-the-record finding;"[80] and (4) policy reasons indicate it is prudent practice and such procedures will facilitate appellate review. Accordingly the court adopted

> the view that when convictions more than ten years old are sought to be introduced into evidence pursuant to Rule 609(b) the district judge should make an on-the-record determination supported by specific facts and circumstances that the probative value of the evidence substantially outweighs its prejudicial effect.[81]

As indicated in *Mahler* the requirement for on-the-record special findings is not unanimous among the circuits. Two courts[82] while finding that Rule 609(b) envisions an "explicit proceedings with full findings setting forth the quality and nature of any possible prejudice to the defendant,"[83] have held that a record which establishes that the judge made a thorough and thoughtful analysis of the issue was sufficient. Still another specifically declined to adopt the *Cavender* requirements for use in its circuit.[84]

Although the courts are in conflict on the exact degree of on-the-record specificity required, all agree that ten year old convictions should be given extremely careful scrutiny. Moreover, as the Court of Military Appeals has stated, "judges should rarely exercise their discretion to admit convictions over ten years old and then only in exceptional circumstances."[85]

The requirement for on-the-record special findings should be adopted as the military rule. The legislative history of Rule 609(b) and the wording of the Rule itself indicate that great care should be exercised in deciding this issue. Repuiring the trial judge to explain his ruling on the record will insure that such care is exercised. Moreover it will facilitate appellate review and as a practical matter result in very new instances in which the conviction will be admitted. Finally, such a requirement would be consistent with the requirements for special findings in Fourth,[86] Fifth[87] and Sixth[88] Amendment motions practice.

EXCLUSIONS—SUPPRESSING OTHERWISE ADMISSIBLE CONVICTIONS

Even if a conviction qualifies for admission under 609(a) and (b) it may still be suppressed

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[77] *Id.* at 7062.

[78] 579 F.2d 730 (2d Cir. 1978).

[79] 579 F.2d at 734.

[80] 579 F.2d at 735.

[81] 579 F.2d at 736. Cavender was decided on 7 June 1978. *Mahler* was decided 26 June 1978. However *Mahler* does not cite *Cavender*. Therefore it appears that two circuits acting quite independently of each other reached the same conclusions with respect to the same issue at approximately the same time. The Seventh Circuit has also indicated Rule 609(b) requires on the record special findings. United States v. Townsend, 555 F.2d 152 (7th Cir. 1977).

[82] *See* United States v. Brown, 603 F.2d 1022 (1st Cir. 1970); United States v. Cohen, 544 F.2d 781 (5th Cir. 1977).

[83] United States v. Cohen, 544 F.2d 781, 786 (5th Cir. 1977).

[84] United States v. Spero, 625 F.2d 779 (8th Cir. 1980).

[85] United States v. Weaver, 1 M.J. 111 (C.M.A. 1975).

[86] Mil. R. Evid. 311(d)(4).

[87] Mil. R. Evid. 304(d)(4).

[88] Mil. R. Evid. 321(f).

via subparagraph (c).[89] This aspect of the Rule provides that certain post conviction activity by the accused, or the government, may act to nullify the conviction's admissibility, thus prohibiting the finders of fact from considering it.

Subparagraph (c) treats this matter in a bifurcated way. Under 609(c)(1) a conviction may not be admitted if the following circumstances have occurred: (A) the conviction has been annulled; (B) the accused has been pardoned; or (C) the accused has rehabilitated himself and can demonstrate this fact through appropriate documentation or similar devices. However, each exception mentioned above will be nullified if the witness is involved in subsequent criminal misconduct and is convicted. Thus if a witness has been pardoned, but is subsequently convicted for an offense punishable by death, dishonorable discharge, or confinement for more than one year, the original conviction will be admissible.

It is important to recognize that (c)(1)'s qualifications are based on a determination that the witnesses has been *rehabilitated*. Thus pardons due to over crowded confinement facilities, political expedience, or related matters may not qualify as an exception under (c)(1). One federal court which evaluated this issue stated that "the final form of this rule resulted from a desire to accord a controlling consideration to rehabilitation as opposed to executive grace or judicial invalidation."[90]

Subparagraph (c)(2) rests on a different foundation. Under its provisions a conviction will not be admissible if it has been the subject of an annulment, pardon or similar procedure based on a determination of *innocence*. The Rule does not provide for a conviction's admissibility if the witness is subsequently convicted of another offense.

Prior *Manual* practice did not allow for an otherwise admissible conviction to be suppressed due to post trial matters.[91] The federal common law, which 609 replaced, was sensitive to the issue, but much narrower in scope.[92] The change in philosophy appears designed to protect court-members from misleading evidence; and witnesses from the embarrassment of being impeached by criminal activity which is no longer relevant. This result is merely an extension of the justification for using convictions as impeaching evidence *ab initio*. As discussed above, such evidence is relevant because witnesses with a criminal past are less likely to tell the truth than those who have always been law abiding citizens.[93] Rule 609(c) mandates that when the witness, by his subsequent conduct, demonstrates that he has rehabilitated himself, and no longer falls within the criminal population, or has had his conviction overturned based on a finding of innocence, than the justification for admitting the prior conviction vanishes. In effect 609(c) transforms such evidence into irrelevance.[94] While commentators and practitioners may pragmatically disagree with this position, the Rule has codified the policy into law.

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[89] (c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if

(1) the conviction has been the subject of a pardon, annulment, certificate or rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

[90] United States v. Wiggins, 566 F.2d 944, 946 (5th Cir. 1978).

[91] *See* para. 153*b*, Manual for Courts-Martial, 1969 (Rev. Ed.).

[92] *See* United States v. Luck, 348 F.2d 763 (D.C. Cir. 1965) where the court refused to apply an inflexible rule to a conviction's admissibility, recognizing that the ultimate resolution of such questions rests with the trial judge's sound exercise of his discretion. Federal courts have referred to 609(e)'s interpretation here as the "blameless life doctrine."

[93] *See* the discussion in the text at note 2, *supra*.

[94] *See* Mil. R. Evid. 401.

Applying 609(c) places substantial responsibilities upon counsel. Not only must the Rule be affirmatively raised at trial, or be treated as waived, but in order to meet the burden of demonstrating rehabilitation or innocence, counsel must have investigated the witness's background sufficiently to make a record of the issue.[95] If this two stage responsibility is not met during trial, it will be unavailable on appeal.[96]

Federal experience with 609(c) has been inconsistent. It appears that subparagraph (c)(2) has caused little concern, while (c)(1) has generated both litigation, and literary debate,[97] a result which clearly appears to be in the military's future. The major concern with (c)(1) resides in defining what qualifies as rehabilitation, and what must be proffered to demonstrate it.[98]

In *United States v. Napoli*[99] the accused objected to the government's attempt at impeaching him with evidence of a prior conviction. Napoli contended that because the State of New York had issued him a "Certificate of Relief from Disabilities," his conviction should not be admitted. The trial court overruled Napoli's objection, finding that the certificate did not demonstrate rehabilitation, only relief from civil limitations. On appeal Napoli contended that while the certificate itself did not discuss rehabilitation, that factor was implicit in its issuance. In affirming the appellate court found Napoli had failed to demonstrate that he had been rehabilitated, or that the certificate in question evidenced that result. The court opined that appellant's position displayed an improper interpretation of the applicable statute.

The importance of making a record of the witness's rehabilitation is highlighted in *United States v. Wiggins*.[100] There appellant contended that he should not have been impeached with evidence of a prior conviction because subsequent to his trial, conviction, and confinement, he was sent to a "halfway house." Appellant then contended that the fact of his release from such a facility should be sufficient to demonstrate rehabilitation. Both the trial and appellate courts disagreed with this position, finding that participation, even release from such a program is not synonomous with rehabilitation. Instead the court suggested that if a witness is to benefit from 609(c)(1) an affirmative showing of actual rehabilitation must be made. While this can be done either through documentary or live testimony, the following criteria should be addressed: (A) the type of program, training, counseling or instruction offered; (B) the objectives and goals of the program; (C) the qualifications and standards the witness must obtain in order to be deemed rehabilitated, and (D) some proof that the witness satisfactorily completed the program.[101] Interestingly, neither the Rule itself, nor the judicial authority interpreting it places any time constraints on the length of the rehabilitation program, nor the possible probationary period following it, for qualification. While both matters are relevant to whether the witness

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[95] *See* United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978). There the accused was convicted of a drug offense and sentenced to confinement. Before being returned to society the accused went to a "half way" house for treatment. At trial, defense counsel only established the location of the accused's treatment, but not what that treatment entailed, nor its possibility of qualifying as rehabilitation. As a result the conviction was admitted. Had counsel researched this matter more thoroughly, with an eye toward being able to demonstrate the rehabilitative potential of the "halfway" house, a different result might have obtained.

[96] Rule 103 generally discusses the requirements for objecting to evidence, and making a record with respect to the objection. Its provisions apply here and were demonstrated in United States v. Napoli, 557 F.2d 962 (2nd Cir. 1977).

[97] *See generally* 3 J. Weinstein and M. Berger, Weinstein's Evidence, ¶ 609[04] (1978); and S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 356-357 (2d Ed. 1977).

[98] *See* United States v. Moore, 556 F.2d 479 (10th Cir. 1979) discussing the applicability of motions *in limine* to this aspect of Rule 609.

[99] 557 F.2d 962 (2nd Cir. 1977).

[100] 566 F.2d 944 (5th Cir. 1978).

[101] *Id.* at 946.

has actually been rehabilitated, their use at trial appears to be limited to weight.

United States v. Thorne[102] demonstrates how broadly 609(c)(1) may be applied when the issue is aggressively litigated. There defense counsel attempted to impeach the government's key witness with evidence of previous convictions. The accused was on trial for escape from custody[103] and a Mr. William Bennet, director of alcohol rehabilitation program confining the accused, was the government's principal witness. On cross-examination defense counsel wanted to demonstrate Mr. Bennet's lack of credibility by showing that he had three previous felony convictions. In 1952 Mr. Bennet had been convicted for grand larceny, in 1959 for burglary, and in 1973 for transporting narcotics. The court had little trouble suppressing the 1952 and 1959 convictions as Rule 609(b) made them remote.[104] However, the 1973 conviction did not similarly suffer. In support of its notion to suppress that evidence, the government demonstrated that while Mr. Bennet had been convicted for transporting narcotics, an offense which would qualify for admission under 609(a),[105] he had received a sentence to six months at the "Therapeutic Community" in Fort Worth, Texas, where he actually served only 110 days. Then, in 1973, Mr. Bennet attended Syracuse University and received a masters degree in guidance and counseling. Mr. Bennet then supervised various drug programs in Florida, and in May of 1975 became supervisor of custory at the facility in question. Most importantly, the government introduced "no formal documentation or certificate of rehabilitation"[106] to show that Mr. Bennet had actually been rehabilitated. Notwithstanding this limitation, and based largely on counsel's proffer and argument, the trial judge suppressed the conviction.

On appeal the central issue concerned the lack of documentary or similar evidence demonstrating rehabilitation through a conventional and organized program. In affirming the trial judge's determination, the court found that the issue did not lend itself to the simplistic approach suggested by defense counsel. Satisfactory completion of a recognized rehabilitation program may be the conventional means of demonstrating that a witness's conviction should be suppressed, but it is not the only means. The court opined that any decision in this area rests with the trial court's sound discretion. In exercising this power the court should be guided not only by whether a certificate demonstrates rehabilitation, but also in the words of 609(c) itself, whether an "equivalent procedure based on a finding of rehabilitation of the person convicted exists."[107] In this case the court agreed such a "procedure" had been proved, and indicated it would not reverse the trial court unless its holding was clearly erroneous. The court summarized its position as follows:

> We think it a purpose of this and other rules to permit exercise of discretion by the trial court in implementing the purpose of the rules to "the end that truth may be ascertained and proceedings justly determined." Rule 102, Federal Rules of Evidence.[108]

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[102] 547 F.2d 56 (8th Cir. 1976).

[103] 18 U.S.C. § 751(a).

[104] As discussed *supra*, convictions more than 10 years old must meet the stringent standards of Rule 609(b) before they are admissible. The convictions mentioned here did not so qualify.

[105] That is, an offense for which the accused could receive a sentence of more than one years confinement, or death.

[106] 547 F.2d at 58.

[107] *Id.* at 59.

[108] *Id.* It is interesting to note that the appellate court referred to Rule 102 in arriving at its decision. Federal Rule of Evidence 102, like it's military counterpart, provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The circuit court's application of 102 in this fashion highlights that Rule's value. In-and-of-itself, 102 is probably

The court's resolution of this issue is important for several reasons. It establishes that no set formula must be compiled with to suppress otherwise admissible convictions. In effect the decision places a premium on counsel's ability to thoroughly investigate a witness's background, present evidence in support of or against rehabilitation, and be able to articulate that theory in argument. The important result here is that pretrial investigation and creativity will often be successful even if traditional rehabilitation processes have not been employed.

This product may be particularly fruitful in court-martial practice. Counsel here can demonstrate a witness's rehabilitative efforts through members of the command. Similarly, military duty often involves specialized training, education, and unique mission requirements which can be garnered to show rehabilitation and the command's recognition of it.

Perhaps the most intriguing aspect of 609(c)(1) concerns the admissibility of convictions which qualify under 609(a) and (b), but may be inadmissible because the witness was sentenced to, and satisfactorily completed the course of training at either the Army Retraining Brigade (hereafter referred to as the A.R.B.), or the Air Force 3320th Correction and Rehabilitation Squadron. Potentially this issue concerns all servicemembers sentenced to confinement and returned to duty. In the Army, the great majority of special court-martial sentences to confinement are served at the A.R.B., and consistent with current regulatory provisions,[109] and their proposed amendments,[110] every servicemember returning to duty after confinement at the United States Disciplinary Barracks will also participate in the A.R.B.'s training program. This fact is significant because the Army's regulations mandate that: "The US Army Retraining Brigade training program consists of rehabilitative training designed to redirect/change soldier attitudes and behavior."[111]

It is clear that the A.R.B.'s mission is to return servicemembers to duty, and will only do so after the servicemember has been rehabilitated. The ARB's own goals and objectives provide:[112]

The training portion of the USARB mission is:

> 1. To provide selected military members the intensive training and professional counseling necessary to return them to duty as competent and highly motivated soldiers with improved behavior patterns.
>
> 2. To eliminate from the service those individuals who do not or cannot meet Army standards.

The best demonstration of these goals, and the A.R.B.'s belief that all personnel completing their training have in fact been rehabilitated resides in the certificate of completion awarded each individual who satisfactorily completes the training. It states:[113]

> During this seven week training program you have proven your tenacity and mettle while being intensively challenged both mentally and physically. You have learned to identify your personal strengths, and weaknesses through participation in small group and individual counseling and you have conformed to a strict honor system. Your self-confidence and pride has been

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not sufficient to provide counsel with relief. But when applied with other substantive evidentiary provisions, it may tip the scales in counsel's favor.

[109] *See* AR 190-47, ¶ 13-1 to 13-8.

[110] *See* Change 1, 1 May 1980 proposed amendments to AR 190-47.

[111] AR 190-47, ¶ 13-6.

[112] Program of Goals and Directives, United States Army Retraining Brigade, Fort Riley, Kansas, p.1 (March 1979).

[113] Fort Riley Form 2219, 1 June 1978. This document and related arguments where employed by Captain Richard E. Monroe in an attempt to suppress his client's previous conviction at a special court-martial authorized to adjudge a Bad Conduct Discharge. *See* United States v. Miller, SPCM # 15052, currently pending decision at the Army Court of Military Review.

strengthened while participating in Rappelling, Confidence Course, the Obstacle Course, Survival Training and many other challenging obstacles. My compliments for completing one of the Army's most challenging programs, a training program that will unquestionably put you far ahead of your contemporaries upon your return to duty.

Relying on the criteria established in *United States v. Wiggins*,[114] *supra*, it appears that completion of the A.R.B.'s training cycle is substantial proof of rehabilitation, complete with documentary verification. The program is designed to return all servicemembers to duty only after the cadre and commander of the A.R.B. are satisfied each troop will be a productive member of the military community. Experience indicates this belief is well founded as the overwhelming majority of servicemembers completing the course go on to earn high efficiency reports, and honorable discharges.[115] Until the Court of Military Appeals has an opportunity to evaluate these issues, counsel should consider raising 609(c)(1) as a means to suppress military convictions whenever possible.

Rule 609(d)[116] concerns the admissibility of juvenile adjudications. Like 609(c), it may be used to suppress evidence which would otherwise be admissible if only 609(a) and (b) were consulted. The new Rule distinguishes between accused and other witnesses. It is substantially different from prior military[117] and federal authority.[118]

The first sentence of subparagraph (d) restates the basic common law philosophy: evidence of juvenile adjudications is generally not admissible. Substantial political and practical considerations have long favored this result. Juvenile court proceedings historically denied the young defendant many rights available to his adult counterpart.[119] Thus the adjudication's validity was often called into question. More importantly, social and political concerns have mandated that youthful offenders[120] be protected from their criminal transgressions because the juvenile's rehabilitation may be hindered by publicizing his misconduct. Many commentators also believe that a child's crimes suggest very little about his credibility as a witness.[121] This is particularly so if the child

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[114] 556 F.2d at 946.

[115] *See* the U.S. Army Retraining Brigade *Courtesy Pamphlet* (1980). This report indicates that enlisted efficiency reports received on Army personnel who have completed the A.R.B.'s training, and returned to duty reveal that "72.4% were rated "Promote Immediately' or 'Promote Ahead of Peers' while 18.3% were rated 'Promote with Peers.' Only 9.3% were rated 'Do Not Promote' or 'Deny Continued Active Duty.' " The numerical breakdown of those A.R.B. graduates earning an Honorable Discharge is equally impressive. The report states:

The table below includes separation data on 5,953 graduates returned to duty during FY 75 through FY 78. Soldiers reassigned to duty but subsequently AWOL or receiving Less Than Honorable discharges are considered program failures.

Reassigned To Duty	5,593
Status Undetermined	2.83%
Currently Active	30.44%
AWOL	4.74%
Discharged From Service	61.99%
Honorable Discharges	64.0%
General Discharges	13.9%
Less Than Honorable Discharges	22.1%

[116] (d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

[117] Paragraph 153*b*(2)(b) of the previous Chapter XXVII, Manual for Courts-Martial, 1969 (Rev. Ed.).

[118] *Cf.*, Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964).

[119] *Id.*

[120] Section 5031 of Article 18 defines juveniles as individuals under 18 years of age.

[121] Comment, "Evidence—Impeachment of Witnesses—Use of Adjudications of Juvenile Delinquency and Specific Acts of Misconduct Committed by Juveniles," 33 N.Y.U.L.Rev. 406 (1958)

offender is now testifying as an adult. The relevancy of this evidence is called into question by the Rule's very language.

However, 609(d) is not meant to be a prophylactic limitation on the use of juvenile convictions, at least as far as non-accused witnesses are concerned. The Rule vests the trial judge with sufficient discretion to allow such evidence to reach the finders of fact if the juvenile adjudication is "necessary for a full and fair determination of the issue of guilt or innocence,"[122] and if "the conviction would have been admissible to attack the credibility of an adult."[123] The Rule declares that while such adjudications may be admissible against ordinary witnesses, they will not be admissible against the accused. The bench has no power to admit juvenile adjudications against an accused.

When 609(d) is used to impeach non-accused witnesses, it requires the trial judge to apply both objective and subjective criteria. Objectively the court must be satisfied that the juvenile adjudication would be admissible if it were admitted against an adult. This means that 609(a) (b) (c) (e) and (f) must be complied with. Assuming the conviction satisfies each of these standards, the bench must then subjectively evaluate the evidence's value in determining guilt or innocence. Again the Rule places a premium on counsel's ability to articulate their position in favor of or against admission. In this matter, "the burden is on the side wishing to use the evidence to show that the particular facts of the case excuse compliance with the usual rule of exclusion."[124] Failure to meet this burden will result in the evidence's exclusion.

To avoid this result two issues should be addressed by counsel. The first demonstrates that the witness has failed to benefit from the rehabilitative process explicit in 609(d)'s prohibitions. Continued association with the criminal milieu, and related misconduct could be offered here. Such evidence will have the effect of showing that the witness's own misconduct demonstrates he is not entitled to the benefits of 609(d), nor the social policies aimed at protecting youthful offenders. Secondly, counsel will need to demonstrate that the adjudication in question is important to the court-member's ability to reach a fair and accurate resolution of the case in hearing. At bottom, counsel is attempting to show that the juvenile adjudication is now *relevant*, and is vital to the court-member's determinations of credibility.[125] In effect counsel's presentation here is not unlike that required by Rule 403.[126] The proponent will have to prove that the probative value of the evidence at bar is more important to the search for justice,[127] than society's interests in protecting and rehabilitating youthful offenders.[128]

This view has been adopted by the United States Supreme Court in *Davis v. Alaska*.[129] There the Court weighed similar concerns and found that the accused's right to confrontation outweighed the state's legitimate desire to protect juveniles from their own crimes.[130] *Davis*

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[122] Mil. R. Evid. 609(d).

[123] *Id.*

[124] 3 J. Weinstein and M. Berger, Weinstein's Evidence, p. 609-86 (1978).

[125] *See* Rule 401's definition of Relevant Evidence.

[126] Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[127] *See* Rule 102, and note 108 *supra*.

[128] There are some objective criteria which can be applied here. For instance, if the witness's prior adjudication occurred when he was 17 years old, as opposed to when he was 11 years old, the court may be more inclined to favor admission. Under these circumstances, the political and social pressures discussed above do not cry out for protection quite as loudly.

[129] 415 U.S. 308 (1974).

[130] In Davis a juvenile witness was protected from cross-examination by a state statute which is similar in its

is important because it recognizes the accused's right to adequately cross-examine government witnesses, and because it places the ultimate resolution of determining how this examination should be conducted with the trial judge. Again no fixed formula controls admission, or suppression. Rather, the matter is left with counsel's ability to formulate and argue the issues at bar. As the majority in *Davis* stated:

> the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.[131]

A pragmatic application of these concepts is evident in *United States v. Jones*.[132] There the accused was charged with robbery of a savings and loan association. His former girl friend, Delores Moore, was called as a government witness and testified against him. Both at trial, and on appeal appellant contended that his ability to adequately cross-examine her was improperly limited by the trial judge. Appellant averred that he should have been permitted to prove her previous juvenile adjudications *and* the details giving rise to it. The trial bench had only permitted evidence of the adjudication itself to reach the fact finders.

The appellate court affirmed and determined that 609(d) and the considerations expressed in *Davis v. Alaska* had been properly applied. Recognizing that proof of the witness's prior adjudication was necessary for a fair determination of the issues at bar, the court agreed that the trial judge had properly allowed defense counsel to establish that "Moore had been adjudicated as a delinquent, that she had been sent to a reformatory, and that the crime was a felony."[133] The court went on to find that the trial judge also properly exercised his discretion by suppressing any evidence concerning the details of the crime itself. Although such evidence was not categorically rejected, the appellate court perceived it as being admissible, even necessary, based on the facts at bar, and counsel's ability to demonstrate their relevance and admissibility. In this event, neither 609(d) nor *Davis v. Alaska* would require suppression.

In *United States v. Harvey*,[134] the Eighth Circuit demonstrated how far federal courts will go in protecting an accused from his own past juvenile adjudications. There the defense called Mrs. Harvey as a character witness for the accused. She testified that her son had the reputation of being a dependable individual and had only "one run in with the law when he was a teenager, and that was a burglary when he was sixteen or seventeen."[135] After a side bar conference, the prosecution was permitted to cross-examine Mrs. Harvey demonstrating that her knowledge of the accused's reputation in the community was slightly flawed. The Assistant United States Attorney than produced the accused's voluminous criminal record including "time spent in the penitentiary for juvenile offenses."[136] In reversing the reviewing court found that:

> After considering this record in its entirety we conclude that the district court committed plain error in permitting the prosecutor to cross-examine the appellant with

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effect to Rule 609(d), *i.e.*, it protected youthful offenders from their past. When the legislative policies giving rise to either the state statute in Davis, or Rule 609 are moved into the criminal court room, they must be measured against the accused's constitutional rights to confrontation, due process of law, and effective assistance of counsel. It is suggested that when the Supreme Court weighed these competing and valid concerns they were compelled to prioritize them; that is, the constitutional protections must be satisfied first, then the state's desires to protect juveniles can be accommodated. This result has not produced a finite formula, but it has created the need for ad hoc evaluations requiring counsel and the court to balance Rule 609(d)'s provisions against the accused's ability to obtain a fair trial.

[131] Davis v. Alaska, 415 U.S. at 321.

[132] 557 F.2d 1237 (8th Cir. 1977).

[133] *Id.* at 1239.

[134] 588 F.2d 1201 (8th Cir. 1978).

[135] *Id.* at 1202.

[136] *Id.* at 1203.

respect to previous convictions of misdemeanors and juvenile adjudications.[137]

Perhaps the most interesting aspect of this decision, and an insight into 609(d)'s strict application, resides in the fact that appellant's own mother initially introduced evidence of the accused's juvenile adjudication, and appeared to be perpetrating a fraud on the court by contending that her son had only one criminal flaw in an otherwise lawful existence. Despite these short comings, and despite the fact that the defense itself opened the door to appellant's criminal childhood, the appellate court slammed it shut.

TIMELINESS REQUIREMENTS: WHEN THE TRIAL RESULT BECOMES A CONVICTION

The first four major sections of 609 define the substantive applications of the Rule. Subparagraphs (e)[138] and (f)[139] explain the mechanical prerequisites which must be met before a witness's trial results attain the status of a "conviction." To be appreciated subparagraphs (e) and (f) should be read together. Pragmatically, if they are not initially satisfied, the remainder of the Rule need not even be consulted.

Rule 609(e) provides that if an accused is tried[140] by a general, BCD special, or special court-martial presided over by a military judge, then that conviction is admissible against the witness even if the conviction is pending appeal.[141] Rule 609(f) adds that the term "conviction" is defined as that point at which a sentence is adjudged, thereby making the convening authority's final action[142] irrelevant to admission.

Alternatively, 609(e) states that if the conviction was produced by a summary court-martial, or a special court-martial without a military judge, than the conviction may not be used for impeachment purposes until the codal provisions requiring review by a legally trained officer have been met.[143] As the drafter's analysis points out, this latter requirement is necessary because trials conducted without military judges run a significantly higher possibility for error than those conducted before a trial judge.[144] This additional limitation can be seen as insurance against self-inflicted wounds.

Both 609(e) and (f) are a break with past *Manual* requirements. Historically evidence of a prior conviction was not admissible until appellate relief had been exhausted.[145] Previous federal authority was split on the issue. For instance, in *United States v. Semensohn*[146] the court opined that a "conviction does not become a final conviction until sentence has been im-

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[137] *Id.* at 1204.

[138] (e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed pursuant to Article 65(c) or Article 66 if applicable. Evidence of the pendency of an appeal is admissible.

[139] (f) *Definition.* For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

[140] *See* Article 16, Uniform Code of Military Justice for a classification of the court-martial system. *See also* Articles 17, 18, 19, 20, 22, 23, and 24.

[141] Those courts and commentators which have generally favored this Rule do so believing that there is an "assumption of correctness which ought to attend judicial proceedings." 3 J. Weinstein and M. Burger, Weinstein's Evidence, 609-88 (1978); United States v. Vanderbosch, 610 F.2d 95, 97 (2nd Cir. 1979).

[142] Articles 60 and 64, Uniform Code of Military Justice, require that the convening authority act upon all sentences and findings adjudged at trial.

[143] *See* Article 65(c) which provides: "(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army, Navy, Air Force, or Marine Coprs, or a law specialist or lawyer of the Coast Guard or Department of the Treasury, and shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation." *See also* Article 66 concerning possible review by the service courts of review.

[144] *See* the drafter's analysis accompanying Rule 609(e). App. 18, Manual for Courts-Martial, 1969 (Rev. Ed.).

[145] *See* previous Manual, para 153*b*(2)(b).

[146] 421 F.2d 1206 (2d Cir. 1970).

posed and until the time for an appeal from the judgement has expired."[147] However, in *United States v. Franicevich*,[148] that court took a diametrically opposed view finding that a witness could be impeached with evidence of his prior conviction even if that conviction were still pending on appeal.

It is interesting to note that because the federal version of 609 does not contain a provision similar to our subparagraph (f), defining when "conviction" occurs, substantial litigation has had to address the topic. For instance, is a conviction final and therefore admissible after the jury convicts, but before the court sentences;[149] subsequent to a plea of guilty, but before sentencing;[150] after sentencing if the court has suspended sentence;[151] or the accused has submitted a petition for new trial?[152] In virtually every incident mentioned above, the federal courts have determined that the conviction was admissible.

While our Rule has anticipated these problems, it could not short circuit all difficulties. A common one troubling federal defenders can be simply stated. Assume that the accused is on trial for possession of heroin and that he testifies in his own defense claiming innocent possession.[153] On cross examination the government attempts to admit a one year old conviction against the accused showing his commission of an identical offense. After further litigation the conviction is deemed admissible in all respects. However, defense counsel now claims that the conviction should not be admitted because it is pending appeal, and while only at the Court of Military Review level, the Court of Military Appeals has just granted relief on an error of law identical to that raised both at trial and on appeal in the conviction under consideration. Based on these facts, if the trial judge acceeds to the government's arguments and admits the conviction, the bench is risking reversal in the case at bar if the impeaching conviction is reversed. Under the facts established above, it would be difficult to find harmless error[154] if the accused were thereafter convicted. As one federal court stated: "If the judgement of conviction is later reversed, the defendant has suffered, unjustly and irreparably, the prejudice, if any, caused by disclosure of the former conviction."[155]

Of course such a result is not inescapable. It has been argued in other cases[156] that using a prior conviction to impeach an accused is al-

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[147] 421 F.2d at 1208.

[148] 471 F.2d 427 (5th Cir. 1973).

[149] *See* United States v. Vanderbosch, 610 F.2d 95 (2nd Cir. 1979) where the court held such a conviction to be admissible. While no authority yet addresses the issue, it is assumed that if a federal conviction would be admissible in a federal proceeding, it will also be admissible before a court-martial, even if sentence had not yet been adjudged.

[150] *See* United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971) where the court opined that a guilty plea "lacked the certainty and finality" to justify its admission for impreachment purposes. In this circumstance the accused could possibly still withdraw his plea.

[151] *See* United States v. Collins, 552 F.2d 1243, 1248 (8th Cir. 1977) where the court found that appellant's previous suspended sentence did not affect the convictions admissibility anymore than an appeal would.

[152] *Cf.*, United States v. Vanderbosch, 610 F.2d 95, 96 (2nd Cir. 1979) discussed above. It appears that a petition for new trial, or similar post trial requests for relief or clemency will not prevent admissibility. However, the trial court still has authority to use its discretion here to suppress a conviction when the interests of justice so require. *See* the discussion concerning Rule 102, and United States v. Luck, 348 F.2d 763 (D.C. Cir. 1965), *supra*.

[153] *See* United States v. Gaines, 49 C.M.R. 699 (A.C.M.R. 1974); United States v. Whitebread, 48 C.M.R. 344 (N.C.M.R. 1973); *cf.* United States v. Griffen, 8 M.J. 66 (C.M.A. 1979); United States v. Wilson, 7 M.J. 290 (C.M.A. 1979).

[154] *See* MRE 103(a) and Article 59(a), Uniform Code of Military Justice, which require that an error at trial materially prejudice a substantial right of the accused before relief is possible. However, *see* MRE 103(d) which also provides for appellate intervention when there has been "plain error."

[155] Campbell v. United States, 176 F.2d 45, 47 (D.C. Cir. 1949).

[156] *See* Judge Goldberg's dissenting opinion in United States v. Franicevich, 471 F.2d 427 (5th Cir. 1973).

ways a risky business. It requires the finders of fact to engage in mental gymnastics which many consider beyond their capabilities. Specifically, the members are asked to use the prior conviction only for the purpose of weighing the witness's credibility, not as proof of his criminal character. In fact Rule 609 codifies this pretense. As a result, if we admit such evidence, believing it can be safely used with cautionary instructions, and relying on the finders of fact to follow those instructions, why should the fact of an impeaching convictions reversal be worthy of note if the finders of fact were appropriately warned of this result by the judge's instructions. When veiwed in this light the matter seems to be more one of "faith" than jurisprudence.

Finally, in order to raise the issue of a pending appeal, motion for new trial, or other post trial relief, counsel should be prepared to do more than merely aver the existence of such possibilities. The trial judge is not required to take counsel's assertions here at face value, and may require the proponent to demonstrate actual pleadings, motions, similar official notices, or in their absence, and in the extraordinary circumstance, a good faith assertion to file such documents.[157]

CONCLUSION

Because MRE 609's impact on the criminal process is so significant, it requires a special place in counsel's pretrial preparation. Each witness's background should be investigated before trial. If as a result it is determined that a previous conviction has been adjudged against a witness, or the accused, a pretrial analysis of its admissibility should take place. The following sequence is suggested as a means for evaluating the conviction's admissibility:

1. Is a military conviction "admissible" under 609(f); that is, has a sentence been adjudged? If not the conviction will be inadmissible.
2. Assuming compliance with 609(f), will a pending appeal affect admissibility under 609(e) or go only to weight?
3. Was the conviction actually a juvenile adjudication and therefore potentially inadmissible under 609(d)?
4. Has the witness been rehabilitated since his conviction and therefore is the conviction suppressible under 609(c)(1)? Or has the conviction itself been vitiated due to a 609(c)(2) determination of innocence?
5. Was the conviction adjudged more than 10 years from the date of trial or release from confinement, and if so suppressible under 609(b)? Has sufficient notice been served concerning this matter?
6. Assuming none of the above liabilities exist, does the conviction qualify for admission under 609(a)(1); that is was it for an offense punishable by more than one years confinement, a dishonorable discharge, or death? If so, and it is against the accused, does it satisfy 609(a)(1)'s balancing test? If not, was the conviction for a *crimen falsi* offense and thus automatically admissible?
7. If it is perceived that the conviction may be suppressible does counsel desire to raise the matter *in limine*, or treat it as an objection to the evidence at trial?
8. Will a previous conviction's admission be sufficient cause for counsel to keep a witness off the stand? If the conviction is against the accused will it be deemed so important as to keep the accused off the stand, or even motivate defense counsel to seek a pretrial agreement instead of contesting the charges?

For many of the issues above there are no answers, and few hard lines. Accurate resolu-

[157] Of course the Uniform Code of Military Justice, and Articles 65, 66, and 67, provide for automatic appellate review in many instances. Thus with respect to most general and special courts-martial authorized to adjudge a bad conduct discharge, no showing of an appeal will be necessary.

tion of these questions will reside in counsel's ability to present and argue his case; the trial judge's sound exercise of his discretion; and the future development of federal and military law. Taken together these matters highlight how important pretrial preparation is, and how much of an impact it can have on counsel's ability to effect the proceedings outcome.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF: DAJA-ZX

7 NOV 1980

SUBJECT: Army Mutual Support

TO ALL STAFF JUDGE ADVOCATES

1. The Army Mutual Support Program (AR 11-22) allows personnel from Reserve component units to train with active Army organizations. In calendar year 1979, our Reserve component judge advocates provided 90,726 hours of mutual support in the following categories:

Legal Assistance	60,583	Labor Law	182
Claims	5,275	Contract Law	1,758
Criminal Law	7,762	ROTC Instruction	1,935
Administrative Law	5,643	Other	7,327
Environmental Law	261		
		TOTAL	90,726

2. These statistics are impressive and represent substantial assistance to those of you fortunate enough to have had this type of support. However, I wish to stress that mutual support is not a buzz word for legal assistance. Each of you must insure that training in all facets of judge advocate operations is provided to Reserve JAG personnel. For example, although Reserve judge advocates (even those in court-martial trial and defense teams) do not normally appear as counsel, they can perform pre-trial and post-trial reviews. Contract law teams should be involved in the government contracting process and other detachments and personnel should participate in claims, administrative law, environmental law, and labor law. In other words, our reserve judge advocates should be involved in all facets of active duty judge advocate activity.

3. Establishing a total mutual support program may require additional work for you and your staff. However, once reserve personnel are fully trained, the trade-off for your providing the means for achieving the type of training discussed above will be continued assistance to your office.

4. Please support this program by insuring that reserve judge advocates are fully integrated into your offices.

ALTON H. HARVEY
Major General, USA
The Judge Advocate General

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. 1980 JAG Conference. The recent worldwide Judge Advocate General's Conference, held 13–17 October 1980, provided an excellent opportunity to exchange information at the various general sessions and topical seminars.

This was the second year that chief legal clerks and other noncommissioned officers were invited to attend the conference, and the first year that a Sergeant Major was responsible for coordinating enlisted representation and representing enlisted interests. This situation not only enabled me to provide some general remarks to all the conferees at the opening session, but also allowed the conducting of a number of seminars dealing with specific issues relevant to enlisted personnel. An extensive effort was made to identify pertinent subjects and then invite as seminar leaders those legal clerks who had an expertise in the subject areas determined to be especially important. Some of the seminars and their leaders were:

Seminar	Leader
Overview on Enlisted Matters	SGM Nolan, OTJAG
Assignment and Enlisted Strength	SFC Meehan, OTJAG Liaison NCO to MILPERCEN
Assignment and Management of MOS 71D & 71E Personnel	Mrs. Stevens, MILPERCEN Assignment Manager
Retraining Brigade Issues	MSG Burton, Fort Riley
Korea Update, Requirements, and Problems	SGM Petersen, HQ Eighth Army
Europe Update, Requirements, and Problems	MSG Cole, HQ USAREUR
Reserve Training for MOS 71D/71E	MSG Yznaga, Sixth Army
CONUS Unit Issues	SGM Judy, Fort Bragg
Court Reporter Problems and Plans for Future Training	SGM Chiti, Senior Court Reporter Fort Bragg

Other formal discussions included such matters as revision of the Advanced NCO Course (ANCOC) and an update of the Enlisted Personnel Management System (EPMS).

The content of these seminars and discussions was summarized in question-and-answer format and included in a 25-minute color videocassette which MSG Cole, SFC Meehan, and I made at the close of the conference. A copy of this tape can be obtained by sending a 30 minute or longer, blank 3/4 inch videocassette and a request for *Personnel Management of MOS 71D & 71E* to The Judge Advocate General's School, ATTN: ADN-T. In the absence of a chief legal clerk, the two largest CONUS Major Army Commands (US Army Forces Command and US Army Training and Doctrine Command) were represented by the warrant officer legal administrators. CW4 Bastille (FORSCOM) and CW4 Gaffney (TRADOC) actively participated in the NCO seminars and discussions, and provided input from their respective commands. CW4 Reca from OTJAG also provided valuable administrative input. The conference provided an excellent opportunity for Corps sergeants major, chief legal clerks and court reporters, warrant officers, and judge advocates to be updated on matters of interest and concern. For example, both MG Harvey and I discussed the SQT results in our remarks.

Several wives of the NCO conferees also attended the conference this year. It is hoped that more spouses of NCOs will attend future conferences.

In summary, I believe the 1980 Conference was truly a success for the enlisted personnel throughout the Corps.

2. ANCOC Graduation. Congratulations to the 32 legal clerks and court reporters who com-

pleted the Advanced Noncommissioned Officer Course at Fort Benjamin Harrison, Indiana, on 17 October 1980. Both MG Harvey and I regret that because of the conflict with the annual JAG Conference this year a senior representative from OTJAG was unable to visit with the course attendees or participate in the graduation exercises.

3. SQT UPDATE. SFC Randall W. Wilhite, a member of the 71D SQT Team, prepared the following SQT update, which I am pleased to share with you.

Initial test results for the 1980 Legal Clerk SQT tests have been received from HQ TRADOC. Analysis of these scores has revealed a number of points of interest for legal clerks and attorney-supervisors alike.

Legal clerks in grade E6 were administered an SQT which tested them on skills at the E7 level. Similarly, grades E4 and E5 were also tested on skills at the next higher grade. The score required to pass on all SQT tests was 60. Following are initial results extracted from a small percentage of the total population; results may change as further data become available.

In grade E6, the average is 78.08. Of all E6 legal clerks tested, 90% passed the SQT. When compared to all other administrative MOS's, this is extremely high. A breakdown of the SQT by test unit shows a 100% pass rate for the Performance Certification Component (PCC), a 96% pass rate for the Hands-On Component (HOC), and a 75% pass rate on the Written Component (WC). Specific problem areas seem to be concentrated in the Written Component. Of the E6's tested, 63% received a NO GO on preparation of DA Form 3 (Individual Claims Data Report); 51% received a NO GO on preparing an initial promulgating order; and 45% received NO GO on assembling correspondence. Areas of superior performance were preparation of a record of trial (98% GO), review of Article 15 proceedings (92% GO), and review of the convening authority's action (96% GO).

In grade E5, the average score is 70.31. Of all E5 legal clerks tested, 68% passed the SQT. When compared to all other administrative MOS's, this is again high. Breakdown by test unit shows a 100% pass rate on the Performance Certification Component, 96% pass rate on the Hands-on Component, and 67% pass rate on the Written Component. Specific problems were concentrated in the Written Component. Of E5 legal clerks tested, 75% received a NO GO on assembling correspondence, 52% received a NO GO on preparing initial promulgating orders, and 51% received a NO GO on preparing claim vouchers. Strong areas were preparing a record of trial (90% GO), preparing non-appeal actions for an Article 15 (89% GO), and preparing a charge sheet (89% GO).

In grade E4, the average score is 64.89. Of all E4 legal clerks tested, 56% passed the SQT. When compared to all other administrative MOS's, this is once again high. While showing pass rates in the performance Certification Component and Hands-on Component similar to those for grade E5, the Written Component pass rate is 61%. Weak areas include 85% NO GO on assembling correspondence, 67% NO GO on preparing a report of Article 32 investigation, and 63% NO GO on reviewing a claim against the government. Areas of greatest strength were preparing appellate actions on an Article 15 (89% GO), preparing charge sheets (85% GO) and preparing claim vouchers (85% GO).

The question most frequently asked is *"How do our legal clerks compare to other soliders?"* By way of an answer, following are the numbers for MOS 71L (Administrative Specialist): Grade E6 71L average score is 49.5 (E6 71D is 78.08) and E5 71L average score is 41.88 (E4 71D is 64.89). It should be noted that 71L and 71D are closely related and that the 71L scores are not remarkably low when compared with all other MOS's, Army-wide.

E4 and E5 legal clerks, with little or no SJA office experience, make up the vast bulk of battalion legal clerks. Comparison of their scores with those of E6 legal clerks would indicate

that this lack of experience has a material effect on skills proficiency. While ultimate responsibility for skill proficiency and training management falls upon the shoulders of the individual soliders and their commanders, SJA's and chief legal clerks can render valuable assistance to the Corps and to their assigned legal clerks by designing and implementing legal clerk training programs at the local level. Such training programs are now in effect in some commands. While installation or geographical area breakdowns of SQT score results are not yet available, the E4 and E5 battalion legal clerks in those commands which have SJA office-supervised training programs obviously have an advantage in preparing for the SQT.

While there is substantial room for improvement, especially in grades E4 and E5, legal clerks in overall SQT performance are clearly head and shoulders above their peers in related fields.

Fact Sheet

US Army Trial Defense Service

On 7 November 1980, the Chief of Staff approved permanent establishment of the US Army Trial Defense Service (USATDS), a separate organization providing military defense counsel services throughout the Army. USATDS will continue to be organized as an activity of the US Army Legal Services Agency, a field operating agency of The Judge Advocate General.

The Army has been testing the USATDS structure for its defense counsel for over two years. A pilot program was first initiated in the Training and Doctrine Command in May 1978. Later, in September 1979, the program was expanded to all units in CONUS, Alaska, Hawaii, and Panama. By 1 January 1980, USATDS was operating on a test basis in all Army commands, including those in Europe and Korea. The purpose of the new organization is two-fold: (1) to improve the efficiency and professionalism of counsel through direct supervision and evaluation within the defense chain; and (2) to eliminate perceptions of soldiers and others that defense counsel have a potential conflict of interest in carrying out their duties.

Since World War II, there have been legislative proposals and recommendations to establish a separate organization for defense counsel. In 1973, the Secretary of Defense approved such a recommendation made by the DOD Task Force on the Administration of Military Justice. More recently, in a 1978 report to Congress, the General Accounting Office (GAO) urged the Army to implement the USATDS program without delay. The Navy and Air Force have had separate organizations for their defense counsel since 1974.

Approval of the program followed comprehensive evaluations which were conducted in the field and at Headquarters, Department of the Army. The final evaluation, completed in April 1980, included the views of all major Army commanders, as well as 35 general and 50 special court-martial convening authorities. Comments and recommendations were also received from over 200 military lawyers assigned as staff judge advocates, trial judges and defense counsel.

Approximately 200 judge advocates are currently assigned to USATDS. They are stationed in field offices which serve commands throughout the Army. A Senior Defense Counsel is in charge of each field office and responsible for local operations. For administrative purposes, the field offices have been grouped into nine geographic regions. Regional Defense Counsel, field grade officers with extensive experience in military justice, supervise defense counsel activities within their regions. They report to the Chief, USATDS, in Washington. Overall supervision is provided by the Assistant Judge Advocate General for Civil Law.

JUDICIARY NOTES

US Army Legal Services Agency

Certificates of Attempted Services

Several GCM authorities are waiting up to 30 days from the date an accused receipts for a copy of the ACMR decision, or when the envelope is returned as undeliverable, to execute certificates of attempted service. Change 20 to AR 27-10, paragraph 15-5c, requires that the ACMR Clerk of Court be *expeditiously* notified by mail of the date delivery was attempted but could not be accomplished. To assure that all material is forwarded to the Clerk of Court as soon as possible, the certificate of attempted service (DA Form 4916-R, figure 15-2, AR 27-10) should be prepared immediately upon receipt of the certified mail receipt (green postal receipt signed by the accused) and/or returned envelope with postal markings. All of these materials, together with the documents referred to in paragraph 15-5b(3), AR 27-10 should then be forwarded to the Office of Clerk of Court (HQDA-JALS-CC).

Corrections by the Army Court of Military Review

The following errors in the initial promulgating order were discovered by the ACMR and corrected by a court-martial order correcting certificate:

a. Failure to add the words "By Military Judge" after the word "Sentence," when trial was by military judge alone—three cases.

b. Failure to indicate the number of previous convictions considered—two cases.

c. Erroneously setting forth dates and amounts, the number of the charge, and the offenses to which the accused entered his pleas—three cases.

Digests—Article 69, UCMJ, Applications

1. In *Best*, SUMCM 1980/4792, the accused was charged with three specifications of larceny extending in time from 12 October 1977 through 31 January 1980. He had reenlisted for a term of six years on 13 January 1978. The issue was whether the accused could be tried by court-martial for any offense occurring after that date.

Once an enlisted man has been discharged from the armed forces, that discharge operates as a bar to subsequent trial for offenses occurring prior to discharge, except in those situations expressly saved by Article 3(a), UCMJ. US v. Gladue, 4 MJ 1 (CMA 1977); US v. Ginyard, 16 USCMA 512, 37 CMR 123 (1967). Article 3(a) establishes continuing court-martial jurisdiction over offenses punishable by confinement for five years or more and for which the offender cannot be tried in the courts of the United States. Here, the court lacked jurisdiction to try the accused for any offenses which occurred during the prior enlistment because the accused was subject to trial for those offenses in courts of the United States.

The accused was charged in Specification 1 with stealing money from the United States Government in Germany during the period 12 October 1977 through 16 November 1977. Section 641 of Title 18, United States Code, makes punishable larceny of property of the United States. The question of extraterritoriality does not preclude trial of the accused under 18 USC 641, because the victim was the United States and the offense is of such a nature that its application is extended to foreign countries by fair inference. *See* US v. Bowman, 260 US 94 (1922); US v. Mongar, 32 CMR 484 (ABR 1962).

With respect to Specification 2, a portion of the continuing offense is alleged to have occurred during a prior enlistment and the remainder during the present enlistment, from 17 November 1977 through 24 April 1978. The only evidence presented at trial was a group of inadmissible documents. In the absence of any competent evidence, it was not possible to ascertain what portion of the offense occurred

prior to 13 January 1978 and what portion, if any, occurred thereafter. Relief was granted as to Specifications 1 and 2 of the Charge.

2. In *Martin*, SPCM 1980/4798, the accused was tried and convicted in absentia. The trial judge had the accused removed from the courtroom because of his repeated disruptive behavior. Among his grounds for relief, the accused contended that mental illness caused his involuntary disruptive behavior at trial, and that the military judge's instructions explaining the absence of the accused informed the court members of uncharged misconduct of the accused. Relief was denied on all grounds.

The military judge, who is responsible for the fair and orderly conduct of the proceedings, afforded the accused a hearing on his disruptive behavior. *See* paragraph 39*b*(1), MCM 1969 (Rev.). During the hearing, the accused was given an opportunity by the military judge to remain in the courtroom upon his assurance of good behavior; the court-martial was recessed to allow the accused to confer with his counsel on the consequences of his actions; the military judge determined that an inquiry into the accused's sanity was warranted, and he directed that the accused be examined by a psychiatrist. *See* paragraph 122, MCM 1969 (Rev.). It was determined that the accused's mental status was within normal limits and his antisocial conduct was not a mental disease or defect. *See* US v. Cortes-Crespo, 9 MJ 717 (ACMR 1980).

Relying on Illinois v. Allen, 397 US 337 (1970), the seminal case on a disruptive accused, it was determined that trial judges, when confronted with disruptive, contumacious, stubbornly defiant defendants, must be given sufficient discretion to meet the circumstances of each case. Here, the military judge did not abuse his judicial discretion in ordering the accused from the courtroom.

Further, the military judge did not err by instructing the court members on the absence of the accused. The military judge at a trial in absentia is required to instruct *sua sponte* that the accused's absence must be disregarded by the court members. US v. Condon, 42 CMR 421 (ACMR 1970). Here, the military judge properly advised the members of the court that the accused's absence could not be considered by them in determining the guilt or innocence of the accused. US v. Allison, 47 CMR 968 (ACMR 1973), *pet. denied*, 48 CMR 999 (1974). Also, the court members during voir dire stated they would not be influenced in their deliberations by the absence of the accused and, upon questioning by the military judge, agreed to follow his instructions.

3. In *Ryland*, SPCM 1980/4786, a roving military police patrol spied a car with German license plates parked on a road close to the Panzer Kaserne rifle range. As the police vehicle approached, the parked vehicle sped away, almost striking the police car. As the vehicle was speeding and on the wrong side of the road, the police followed it and stopped the driver for reckless driving. The driver, who was the accused, was asked for his identification card and driver's license. The accused produced a Florida license, and eventually admitted that he did not have the required USAREUR operator's license. SP4 B, a military policeman, then apprehended the accused for driving without a USAREUR license, and, incident to that apprehension, searched the accused. He discovered a pipe containing what appeared to be hashish in the accused's pants pocket. At trial, the accused objected to the admissibility of the pipe, hashish, laboratory report, and chain-of-custody document on the basis that they were obtained as the result of illegal acts by the military police.

The accused contended that there was insufficient probable cause for the police to initially approach the parked vehicle. Even if there was not sufficient probable cause to apprehend, the fact that a car with German license plates was parked suspiciously close to a US Forces rifle range is reasonable cause for an investigatory stop. *See* Terry v. Ohio, 392 US 1 (1968); US v. Edwards, 3 MJ 921 (ACMR 1977), *pet. denied*, 4 MJ 128 (CMA 1977).

The accused next contended that the request to produce a USAREUR license was a request

that he incriminate himself and was not preceded by an Article 31, UCMJ, warning. According to the accused, when he produced a Florida license, the military police should have had a reasonable suspicion that he did not have a USAREUR license. Thus, further requests for the license amounted to demands that the accused incriminate himself by admitting that he did not possess the required license. The contention that the police should have suspected that the accused did not possess a USAREUR license was rejected. The Article 31, UCMJ, warning requirements did not become operative until the accused became a suspect or indicated that complying with the request would tend to incriminate him. US v. Smith, 4 MJ 210 (CMA 1978).

Finally, the accused contended that the fruits of the search of his person should not have been received in evidence because the military police were not authorized to apprehend him for a minor traffic violation. In Gustafson v. Florida, 414 US 260 (1973), the United States Supreme Court placed its imprimatur of approval on a custodial arrest for a minor traffic violation. Further, Article 7, UCMJ, and paragraph 19, MCM 1969 (Rev.), authorize a custodial apprehension for any violation of the Code. Relief was denied.

4. In *Thompson*, SPCM 1980/4820, the accused was charged with willfully disobeying the lawful order of a superior noncommissioned officer to immediately prepare for field training exercises. He was convicted, by exceptions and substitutions, of being disrespectful towards the same noncommissioned officer, who was then in the execution of his office, by saying to him, "I'm not going on any damn field exercise, I have an appointment." He contended that there was a fatal variance between the specification and the findings because the essential element of being "in the execution of his office" was not included in the specification either expressly or by implication.

A military judge may, by exceptions and substitutions, convict an accused of an offense necessarily included in the charged offense. Paragraph 74*b*(3), MCM 1969 (Rev.). The offenses of willful disobedience and disrespect stand in the relationship of greater and lesser charges when the evidence establishes that the disobedience occurred in a disrespectful manner. US v. Virgilito, 22 USCMA 394, 47 CMR 331 (1973); US v. Croom, 1 MJ 635 (ACMR 1975). In this case, the accused's reply to SGT B was obviously disrespectful. It not only rejected compliance with SGT B's lawful order, but was rude and detracted from the respect due the authority and person of a superior noncommissioned officer. *See* US v. Barber, 8 MJ 153 (CMA 1979); US v. Virgilito, *supra;* US v. Sorrells, 49 CMR 44 (ACMR 1974); US v. Dew, No. S14458 (ACMR 24 July 1980)

Still left for determination was whether the element of being "in the execution of his office" was fairly embraced within the allegation of willful disobedience. A noncommissioned officer is in the execution of his office when engaged in any act or service required or authorized to be done by him. *See* US v. Brooks, 44 CMR 873, 875, 876 (ACMR 1971). When a noncommissioned officer orders an accused to prepare for military training, it can fairly be implied that he is in the execution of his office when he gives the order.

The law does not require that a lesser offense be necessarily included in the offense charged. The question is whether the allegations fairly embrace the elements of the lesser offense and thus give adequate notice to the accused of the offense against which he must defend. US v. Virgilito, *supra;* US v. Thacker, 16 USCMA 408, 37 CMR 28 (1966). An allegation that an accused willfully disobeyed an order at least puts him on notice of the manner of that disobedience. Relief was denied.

5. In *Mosely*, SUMCM 1980/4858, the accused, an electrocardiogram technician at an ECG Clinic of a US Army Hospital, was convicted of a violation of an order issued by a Specialist Six to sign out on her absence from the ECG Clinic. The purpose of the order was to insure the presence of an ECG technician to avoid delayed patient care.

The accused readily conceded that she did not comply with the order and that the SP6 was "one of my superiors" but contended that it was on the basis that a specialist could not issue this order. Relying on the provisions of paragraph 4-3, AR 600-20, the accused maintained at trial that a SP6 was not in a position that would "require the exercise of enlisted command of troops", and further, that a SP6 could only issue the order "under exceptional circumstances."

The accused is correct in her contention that ordinarily "duty positions of specialist are not enlisted command positions." Paragraph 4-3, AR 600-20. However, the accused's further contention that only under "exceptional circumstances" may a specialist issue an order is not recognized under the regulation or case law. The regulation recognizes that specialists will "exercise leadership with respect to matters related to their speciality." Paragraph 4-3*a*, AR 600-20. Here, the specialist occupied a significant position in a US Army Hospital which required the exercise of leadership in ensuring the health and welfare of his patients. His duties and position as a wardmaster in a US Army Hospital, which included the supervision and management of a clinic and the management of the paraprofessional nursing personnel, empowered him to issue an order and obligated the accused to obey it. *See* US v. Stovall, 44 CMR 576 (AFCMR 1971). Relief was denied.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Crimes (Wrongful Appropriation of a Vehicle)

Where a servicemember is initially authorized to possess a vehicle but appropriates it wrongfully for an unauthorized purpose, it is essential to establish the proper scope of his authority with respect to the vehicle. In a recent case, the accused was authorized to possess a vehicle for movement from point A to point B and back. The Government alleged that he used it to transport stolen property in the interim. The accused contended that he was merely transporting authorized goods in the course of official business. The Government relied on circumstantial evidence to prove that the goods were stolen. During oral argument, ACMR showed concern that no trip ticket or other evidence identifying the scope of the accused's authority was introduced. Introduction of such evidence, if available, may foreclose the issue of sufficiency of the evidence.

2. Documentary Evidence

Deficiencies in documentary evidence continue to be a major source of concern to appellate courts. CMA recently reversed as to sentence in a series of cases where records of nonjudicial punishment were "so dimly visible" or "so badly smudged" as to be "beyond recognition." In such cases, counsel should seek alternative copies from the accused's finance records or his OMPF. *See* paragraph 3-15, AR 27-10. In addition, the importance of creating and maintaining legible copies must constantly be impressed upon commanders, clerks, and record custodians.

Problems also arise with the DA Form 4187, Personnel Action. Paragraph 5-9*f*, AR 680-1, *Personnel Information Systems—Morning Report, Reports Control Symbol AG 140 (R 5)* (IC 281930Z Oct 76) and paragraph 2-3*a*, AR 680-1, *Personnel Information System, Unit Strength Accounting Reporting* (1 October 78) (effective 1 December 1980) designate the persons authorized to sign the forms and require that the authenticator's position or title be indicated. In several cases currently under challenge, the forms either fail to indicate the position of the authenticator or have been signed "for" an authorized person by a person of unidentified authority. One need only refer to *United States v. McCullers*, 7 M.J. 824 (ACMR

1979), to see how strictly ACMR applies such regulations. There the Court struck an otherwise regular form merely because a commander checked the "is approved" block instead of the "is verified" block. Counsel encountering improperly signed forms should seek either corrected copies or live testimony. Commanders and authorized representatives should be reminded about the correct method of executing forms.

3. Enlisted Court Members

Remember that specialists rank *below* noncommissioned officers of the same pay grade. Army Regulation 600-20, *Personnel—General, Army Command Policy and Procedure*, 28 April 1971, Table 1-1. Thus, a specialist four, regardless of date of rank, should never sit as a member in the court-martial of a corporal, etc. Fortunately in a recent case where this occurred, the defense had waived the error.

4. General Deterrence Argument

Trial counsel must be certain to make clear in argument that general deterrence is not the only basis for punishment. While approving such arguments generally, CMA has stressed that trial counsel may not invite court members to rely on deterrence to the exclusion of other factors. *United States v. Lania*, 9 M.J. 100 (CMA 1980). In several recent cases, trial counsels' allusions to other sentencing factors have been notably scant and may invite error.

5. Rebuttal of Accused

Frequently it is fruitful to determine if an accused either has received nonjudicial punishment more than two years before the date of trial or has been the subject of adverse administrative action. Such incidents are frequently detectable from the accused's personnel records and are admissible as matters in rebuttal. Paragraph 75*e*, MCM. In a recent case an accused boasted during extenuation and mitigation that he was a "great soldier" and should be retained. On cross-examination, an alert trial counsel asked the accused why he had only spent nine months in his previous duty assignment where he held a nuclear MOS. The accused proceeded to relate his involvement in a three-year-old drug transaction which had resulted in nonjudicial punishment.

6. Motions

Trial counsel should oppose a motion for a finding of not guilty if there are any lesser included offenses in issue. Paragraph 71*a*, MCM. In a recent disrespect case, the trial judge granted a motion to dismiss a specification based on insufficient evidence of knowledge of superiority. Later, agreeing that provoking language (Article 117, UCMJ) was fairly pleaded and proved, the judge found appellant guilty of the lesser offense. On appeal, appellant urges that dismissal of the specification also had the effect of dismissing the lesser included offense.

7. Review and Action (Qualifications of Convening Authority)

A convening authority should not review a record in which an acting convening authority granted immunity to a witness or entered into a pretrial agreement with a witness in exchange for the witness' promise to testify in the accused's trial. Where a convening authority is the *successor* in command to the convening authority who granted immunity or entered the agreement, the successor is not disqualified from acting on the record. *United States v. Christopher*, 9 M.J. 911 (ACMR), *pet. denied*, ___ M.J.___ (CMA Nov. 17, 1980). However, where the convening authority who granted immunity or entered the agreement is only a temporary successor and is a subordinate of the convening authority, the convening authority is disqualified. *United States v. Maxfield*, 20 USCMA 496, 43 CMR 336 (1971).

8. Sentence and Punishment (Instructions/ Maximum Punishment)

Remember that in a rehearing, "other trial" of the same case, or new trial no punishment may be adjudged which exceeds the sentence previously adjudged or approved. Article 63(b), UCMJ; paragraphs 76*b*(1), 81*d*(1) and (2), and

110*a*(2), MCM. This is the case regardless of the fact that the previous proceeding may have contained a jurisdictional defect. In a recent case involving an "other trial," the military judge erroneously instructed, over defense objection, that the maximum punishment was that permitted by paragraph 127*c*, MCM. Trial counsel must monitor the judge in order to preclude rehearings on sentence.

9. Sentence and Punishment (Maximum Punishment)

Paragraph 6-19*f*, Army Regulation 190-47, The United States Army Correctional System (1 Oct 78), provides that:

> As a matter of policy, any sentence imposed on an enlisted person that exceeds forfeitures of two-thirds pay per month for 6 months should be remitted by the convening authority unless the sentence includes, and the convening authority approves, a punitive discharge or confinement, unsuspended, for the period of such forfeitures.

In a recent case, a Sergeant First Class was convicted of 13 specifications of blackmarketing. The sentence was approved provided for reduction to be fourth enlisted grade and forfeitures of $200 pay per month for 18 months. Noting that the policy was not mandatory, ACMR found it to be appropriate under the circumstances and reduced the period of forfeitures to six months.

The staff judge advocate is required to bring this policy to the convening authority's attention in the post-trial review, where applicable, and make a recommendation. *United States v. Bumgarner*, 43 CMR 559 (ACMR 1970). If the staff judge advocate recommends against following the policy in a particular case, his reasons should be set forth. If the staff judge advocate recommends that the policy be followed but the convening authority disagrees and approves greater forfeitures, the convening authority must state the reasons for his actions in a letter transmitting the record to the Judge Advocate General. Paragraphs 85*c* and 91*a*, MCM. Such a procedure may also persuade the appellate courts to defer to the convening authority's judgment.

Legal Assistance Items

Major Joel R. Alvarey, Major Joseph C. Fowler, and Major Walter B. Huffman
Administrative and Civil Law Division, TJAGSA

Bankruptcy—Chapter 13 Repayment Plan

Mr. Anderson, member of the U.S. Navy, and his wife filed a joint petition for relief under Chapter 13, Adjustments of Debts of an Individual With Regular Income. The plan addressed only those debts with a security interest. The proposal was to pay the fair market value, as of the date of the filing of the petition, of the secured claim and 1% of the unsecured portions of the debts. The total debts with security interest equaled $4,795 and the fair market value of that property equaled only $2125 because of depreciation of the property since purchasing it. Thus the debtors would pay $2125 plus 1% of the difference between $4795 and $2125 over a 15 month period. The debtors admitted they could afford to pay more of the unsecured claims but chose not to, arguing the Bankruptcy Act did not require more.

The bankruptcy court ruled that although the plan met the technical requirements of Chapter 13, it was not proposed in good faith, and refused to confirm it. Chapter 13's purpose is to allow debtors to pay their obligations in a reasonable fashion which, in the debtor's circumstances, is fair to his creditors. Each case must be reviewed based upon its unique facts to determine if the debtor is paying according to his ability. In this case, the debtors had the ability to pay more but chose not to. The court stated Congress sought to avoid just this type of abuse.

Non-Judicial Punishment

Quarterly Punishment Rates Per 1000 Average Strength July-September 1980

	Quarterly Rates
ARMY-WIDE	51.34
CONUS Army commands	57.95
OVERSEAS Army commands	40.51
USAREUR and Seventh Army commands	40.88
Eighth US Army	65.17
US Army Japan	13.60
Units in Hawaii	15.27
Units in Alaska	27.78
Units in Panama	49.03

Courts-Martial

Quarterly Court-Martial Rates Per 1000 Average Strength July-September 1980

	GENERAL CM	SPECIAL CM BCD	SPECIAL CM NON-BCD	SUMMARY CM
ARMY-WIDE	.40	.45	.99	1.26
CONUS Army commands	.27	.34	.99	1.55
OVERSEAS Army commands	.61	.65	.97	.79
USAREUR and Seventh Army commands	.70	.69	.96	.57
Eighth US Army	.31	.82	1.48	1.51
US Army Japan	.39	—	.78	—
Units in Hawaii	.38	.38	.77	1.04
Units in Alaska	.62	.62	.37	2.62
Units in Panama	.14	.14	1.27	2.83

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

1. Mobilization Designee Vacancies

There are a large number of mobilization designee positions now vacant. Reserve Component Judge Advocates should be aware that the U.S. Army Mobilization Personnel Processing System (MOBPERS) preassigns (earmarks), by computer, all non-MOBDES control group officers as "fillers" to vacant positions in deploying units and on mobilization station MOB TDAs.

These officers do not, however, receive preassignment orders. Only the RCPAC computer and the mobilization station is aware of the actual proposed assignment of the preassigned officer.

During FY81, non-MOBDES control group judge advocates will be officially preassigned to augmentation positions on MOB TDA. Criteria for preassignment will be age, grade, experience and geographical proximity of the officer to the mobilization station. Although these officers will receive preassignment orders, they will not be entitled as a result of such preassignment to two weeks training with the mobilization station to which preassigned.

Non-MOBDES control judge advocates who desire to apply for one or more of the many vacant MOB DES positions are encouraged to review the list of vacant positions printed below. Such officers should complete the Application for Mobilization Designation (DA Form 2976) and forward it to The Judge Advocate General's School, ATTN: JAGS-RA (Colonel Carew), Charlottesville, Virginia 29901. Interested officers are reminded that mobilization designees are normally guaranteed a minimum of two weeks training annually with their mobilization agency.

Current positions available are as follows:

GRD	*PARA*	*LINE*	*SEQ*	*POSITION*	*AGENCY*	*CITY*
MAJ	01K	01A	02	Judge Advocate	Fitzsimons AMC	Aurora, CO
MAJ	04	01A	01	Judge Advocate	Letterman AMC	Presidio SF, CA
MAJ	04	01A	02	Judge Advocate	Letterman AMC	Presidio SF, CA
MAJ	04	02A	01	Asst JA	Walter Reed AMC	Washington, DC
CPT	04	02A	02	Asst JA	Walter Reed ARC	Washington, DC
MAJ	05	02B	01	Legal Officer	Ofc Gen Counsel	Washington, DC
CPT	02	01A	01	Judge Advocate	USA Garrison	Ft Detrick, MD
LTC	06	04	09	Military Judge	US Army Legal Services Agency	Falls Church, VA
MAJ	06	07	10	Mil Judge (SPCM)	US Army Legal Services Agency	Falls Church, VA
MAJ	08	05	02	Judge Advocate	US Army Legal Services Agency	Falls Church, VA
MAJ	08	05	03	Judge Advocate	US Army Legal Services Agency	Falls Church, VA
CPT	08	07	01	Judge Advocate	US Army Legal Services Agency	Falls Church, VA
MAJ	09	06	02	Judge Advocate	US Army Legal Services Agency	Falls Church, VA
CPT	09	08	02	Judge Advocate	US Army Legal Services Agency	Falls Church, VA
LTC	04	08	01	Deputy Chief	USA Clms Service	Ft Meade, MD
LTC	05A	02	01	Deputy Chief	USA Clms Service	Ft Meade, MD
LTC	09C	03	01	JA POW & War Cr	Ofc Judge Advocate General	Washington, DC
MAJ	10D	03	01	JA Pers Law Br	Ofc Judge Advocate General	Washington, DC
LTC	11A	04	01	JA Opinions Br	Ofc Judge Advocate General	Washington, DC
LTC	17A	02	01	Asst C Debar Sus	Ofc Judge Advocate General	Washington, DC

GRD	PARA	LINE	SEQ	POSITION	AGENCY	CITY
CPT	04A	04	01	Legal Editor	The Judge Advocate General's School	Charlottesville, VA
CPT	04	04	02	Asst SJA	MTMC Eastern Area	Bayonne, NJ
CPT	01	05	01	Judge Advocate	Gulf Outport	New Orleans, LA
MAJ	78	02	01	Cmd JA	USA Depot	Corpus Christi, TX
MAJ	07	02	01	Judge Advocate	USARSCH Technology Sch	Moffet Field, CA
MAJ	26D	01A	01	Legal Advisor	USA TSARCOM	St. Louis, MO
LTC	02	01A	01	Asst JA	HQ Ft Huachuca	Ft. Huachuca, AZ
MAJ	02	01B	01	Asst JA	HQ Ft Huachuca	Ft. Huachuca, AZ
MAJ	02	01B	02	Asst JA	HQ Ft Huachuca	Ft. Huachuca, AZ
MAJ	02	01B	03	Asst JA	HQ Ft Huachuca	Ft. Huachuca, AZ
MAJ	02	01B	04	Asst JA	HQ Ft Huachuca	Ft. Huachuca, AZ
MAJ	02	01B	05	Asst JA	HQ Ft Huachuca	Ft. Huachuca, AZ
CPT	08C	05	02	Trial Counsel	172d Inf Bde	Ft. Richardson, AK
CPT	57	03	02	Asst SJA	172d Inf Bde	Ft. Richardson, AK
CPT	03B	01B	01	Trial Counsel	USA Garrison	Ft. Devens, MA
CPT	03E	01	01	Claims Off	USA Garrison	Ft. Devens, MA
LTC	05A	01	01	Ch Mil Affairs	USA Garrison	Ft. Bragg, NC
MAJ	05A	04	01	Judge Advocate	USA Garrison	Ft. Bragg, NC
LTC	05B	01	01	Ch Mil Justice	USA Garrison	Ft. Bragg, NC
MAJ	05B	02	01	Defense Counsel	USA Garrison	Ft. Bragg, NC
CPT	05B	04	01	Asst Judge Advocate	USA Garrison	Ft. Bragg, NC
CPT	05B	05	01	Asst Judge Advocate	USA Garrison	Ft. Bragg, NC
CPT	05B	07	01	Defense Counsel	USA Garrison	Ft. Bragg, NC
CPT	05B	08	01	Trial Counsel	USA Garrison	Ft. Bragg, NC
MAJ	05C	02	01	Judge Advocate	USA Garrison	Ft. Bragg, NC
MAJ	05D	01	01	Claims Off	USA Garrison	Ft. Bragg, NC
LTC	03	02	01	Asst SJA	101st ABN Division	Ft. Campbell, KY
CPT	03A	02	02	Trial Counsel	101st ABN Division	Ft. Campbell, KY
CPT	03A	02	04	Trial Counsel	101st ABN Division	Ft. Campbell, KY
CPT	03B	02	04	Defense Counsel	101st ABN Division	Ft. Campbell, KY
CPT	03B	02	05	Defense Counsel	101st ABN Division	Ft. Campbell, KY
CPT	03B	02	06	Defense Counsel	101st ABN Division	Ft. Campbell, KY
CPT	03C	03	01	Admin Law Attorney	101st ABN Division	Ft. Campbell, KY
CPT	03D	06	02	Asst SJA-DC	USA Garrison	Ft. Stewart, GA
CPT	03E	02	02	Asst SJA	USA Garrison	Ft. Stewart, GA
CPT	102	A01	01	Asst SJA	USA Garrison	Ft. Stewart, GA
CPT	102	B01	01	Asst SJA	USA Garrison	Ft. Stewart, GA
CPT	102	B02	01	Asst SJA-TC	USA Garrison	Ft. Stewart, GA
CPT	102	B03	01	Asst SJA-DC	USA Garrison	Ft. Stewart, GA
CPT	102	B03	02	Asst SJA-DC	USA Garrison	Ft. Stewart, GA
CPT	102	B03	03	Asst SJA-DC	USA Garrison	Ft. Stewart, GA
CPT	102	001	01	Asst SJA	USA Garrison	Ft. Stewart, GA
CPT	102	001	02	Asst SJA	USA Garrison	Ft. Stewart, GA
MAJ	102	01	01	Asst SJA	USA Garrison	Ft. Stewart, GA
CPT	52C	02	02	Asst SJA	USA Garrison	Ft. Stewart, GA
LTC	03	02	01	Deputy SJA	USA Garrison	Ft. Hood, TX
MAJ	03B	02	01	Trial Counsel	USA Garrison	Ft. Hood, TX

GRD	PARA	LINE	SEQ	POSITION	AGENCY	CITY
MAJ	03C	01	01	Defense Counsel	USA Garrison	Ft. Hood, TX
MAJ	03D	02	02	Asst Judge Advocate	USA Garrison	Ft. Hood, TX
MAJ	03E	01	01	Ch Legal Asst Of	USA Garrison	Ft. Hood, TX
CPT	03E	03	02	Legal Asst Off	USA Garrison	Ft. Hood, TX
MAJ	03F	01	01	Claims Off	USA Garrison	Ft. Hood, TX
CPT	03F	03	01	Asst Claims Off	USA Garrison	Ft. Hood, TX
CPT	04	06	01	Asst SJA	USA Garrison	Ft. S Houston, TX
MAJ	03B	01	01	Ch Def Counsel	5th Inf Div	Ft. Polk, LA
CPT	03B	03	01	Def Counsel	5th Inf Div	Ft. Polk, LA
CPT	03B	03	02	Def Counsel	5th Inf Div	Ft. Polk, LA
CPT	03B	03	03	Def Counsel	5th Inf Div	Ft. Polk, LA
CPT	03B	03	04	Def Counsel	5th Inf Div	Ft. Polk, LA
CPT	03B	04	02	Trial Counsel	5th Inf Div	Ft. Polk, LA
MAJ	03C	01	01	Asst SJA	5th Inf Div	Ft. Polk, LA
MAJ	03C	01	02	Asst SJA	5th Inf Div	Ft. Polk, LA
MAJ	03C	01	02	Ch Mil Justice	USA Garrison	Ft. Sheridan, IL
MAJ	02A	02	01	Ch Def Counsel	USA Garrison	Ft. Riley, KS
MAJ	02B	03	01	Ch Legal Asst	USA Garrison	Ft. Riley, KS
CPT	02B	04	01	Asst JA	USA Garrison	Ft. Riley, KS
CPT	03B	07	01	Trial Counsel	USA Garrison	Ft. Carson, CO
CPT	03B	04	01	Judge Advocate	USA Garrison	Ft. Drum, NY
CPT	03B	04	02	Judge Advocate	USA Garrison	Ft. Drum, NY
CPT	03C	02	01	Judge Advocate	USA Garrison	Ft. Drum, NY
CPT	03C	02	02	Judge Advocate	USA Garrison	Ft. Drum, NY
CPT	03C	02	03	Judge Advocate	USA Garrison	Ft. Drum, NY
CPT	03D	01	01	Judge Advocate	USA Garrison	Ft. Drum, NY
MAJ	03B	01	01	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	01	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	02	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	03	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	04	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	05	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	06	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	07	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	08	Judge Advocate	USA Garrison	Annville, PA
CPT	03B	03	09	Judge Advocate	USA Garrison	Annville, PA
MAJ	03C	01	01	Leg Aff Off	USA Garrison	Annville, PA
CPT	03B	03	02	Judge Advocate	USA Garrison	Sparta, WI
CPT	03B	03	03	Judge Advocate	USA Garrison	Sparta, WI
CPT	03B	03	04	Judge Advocate	USA Garrison	Sparta, WI
CPT	03C	02	02	Mil Aff Leg Asst Of	USA Garrison	Sparta, WI
MAJ	66	02	01	Judge Advocate	USA Garrison	Sparta, WI
MAJ	03D	01	01	Ch Admin Law Br	USA Garrison	Ft. Lewis, WA
CPT	21J	01	01	Judge Advocate	USA Garrison	Ft. Lewis, WA
LTC	62F	02	01	Litigation Attorney	USA Forces Cmd	Ft. McPherson, GA
CPT	03B	02	01	Judge Advocate	USA Garrison	Ft. Buchanan, PR
MAJ	03D	01	01	Ch Judge Advocate	USA Garrison	Ft. Buchanan, PR
CPT	03D	02	01	Judge Advocate	USA Garrison	Ft. Buchanan, PR

GRD	PARA	LINE	SEQ	POSITION	AGENCY	CITY
CPT	03E	02	01	Judge Advocate	USA Garrison	Ft. Buchanan, PR
MAJ	05D	02	01	Mil Affairs Off	USA Armor Center	Ft. Knox, KY
MAJ	31I	01	01	Chief	USA EN Center	Ft. Belvoir, VA
CPT	31I	04	01	Instr	USA EN Center	Ft. Belvoir, VA
CPT	31I	04	02	Instr	USA EN Center	Ft. Belvoir, VA
CPT	31I	04	03	Instr	USA EN Center	Ft. Belvoir, VA
CPT	31I	04	04	Instr	USA EN Center	Ft. Belvoir, VA
CPT	31I	04	05	Instr	USA EN Center	Ft. Belvoir, VA
MAJ	05	03B	01	Asst SJA	QMC Ft Lee	Ft. Lee, VA
MAJ	04A	02A	01	Sr Def Counsel	USA Inf Cen	Ft. Benning, GA
CPT	04A	04A	01	Trial Counsel	USA Inf Cen	Ft. Benning, GA
LTC	04B	01	01	Chief MALAC Br	USA Inf Cen	Ft. Benning, GA
CPT	04B	03	01	Admin Law Off	USA Inf Cen	Ft. Benning, GA
MAJ	14B	02	02	Asst SJA	USA Signal Cen	Ft. Gordon, GA
CPT	07A	03	02	Judge Advocate	AVN Center	Ft. Rucker, AL
CPT	07A	04	01	Mil Judge	AVN Center	Ft. Rucker, AL
MAJ	38B	01	01	Admin Law Off	USA Garrison	Ft. Chaffee, AR
MAJ	38B	02	01	Admin Law Off	USA Garrison	Ft. Chaffee, AR
CPT	30B	02A	01	Defense	USA AD Cen	Ft. Bliss, TX
MAJ	30C	01A	01	Mil Justice Off	USA Ad Cen	Ft. Bliss, TX
CPT	04	03A	01	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
CPT	04	03A	02	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
CPT	04	03A	03	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
CPT	04	03A	04	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
CPT	04	03A	05	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
CPT	04	03A	06	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
CPT	04	03A	07	Asst SJA	USA Combine Arm Cen	Ft. Leavenworth, KS
MAJ	06	02	01	Dep SJA	USA Admin Center	Ft. B Harrison, IN
MAJ	11D	04	01	Instr Intl Law	USA Institute for Mil	Ft. Bragg, NC
CPT	10D	06	01	Instr	USA Intel Cen Sch	Ft. Huachuca, AZ
CPT	10D	06	03	Instr	USA Intel Cen Sch	Ft. Huachuca, AZ
MAJ	12	02	02	Asst JA	ARNG TSA Cp Atterbury	Edinburg, IN

The SJA office at CINCPAC, Camp Smith, Hawaii, has announced an 0-6 JAGC mobilization designee vacancy. Applicant must be a resident of Hawaii and be an 04, 05 or 06. Interested applicants should submit DA Form 2976 directly to TJAGSA, Reserve Affairs Department, Colonel Carew.

2. Trial Defense Service: New Mobilization Designee Positions

The U.S. Army Trial Defense Service has recently been authorized 16 mobilization designee positions. These positions will be handled similarly to the military judge mobilization designee positions, i.e. the individuals who are mobilization designees to the Trial Defense Service will be scheduled by the Chief, Trial Defense Service to perform annual training at various locations throughout the United States to be determined on the basis of need during

that particular year. The positions are as follows:

GRD	PARA	LINE	SEQ	POSITION
MAJ	013	10	01	SP Project Officer
MAJ	013	12	01	SR Defense Counsel
MAJ	013	12	02	SR Defense Counsel
MAJ	013	12	03	SR Defense Counsel
MAJ	013	12	04	SR Defense Counsel
MAJ	013	12	05	SR Defense Counsel
CPT	013	18	01	Trial Defense Counsel
CPT	013	18	02	Trial Defense Counsel
CPT	013	18	03	Trial Defense Counsel
CPT	013	18	04	Trial Defense Counsel
CPT	013	18	05	Trial Defense Counsel
CPT	013	18	06	Trial Defense Counsel
CPT	013	18	07	Trial Defense Counsel
CPT	013	18	08	Trial Defense Counsel
CPT	013	18	09	Trial Defense Counsel
CPT	013	18	10	Trial Defense Counsel

Applicants should forward their Forms 2976 to Colonel William L. Carew, Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901.

CLE News

1. Claims Seminars

1. The U.S. Army Claims Service (USARCS) will conduct two and one-half day Claims Seminars at the following locations:

a. El Paso, Texas, 1–4 March 1981.

b. Fort Walton Beach, Florida, 15–18 March 1981.

2. Principal objective of the seminars is to discuss current developments and review methods for processing claims. All staff judge advocate offices in CONUS are requested to encourage not only the attendance of their claims officers but also at least one or two of their adjudicator, investigator or claims clerk personnel. The seminars will be broken down into two separate sessions:

Torts/Medical Care Recovery Session

Administrative Procedures, Personnel Claims and Carrier Recovery Session

It is anticipated that these informal seminars will provide an opportunity for indepth discussions of mutual problem areas.

3. Representatives of all commands having a claims settlement or investigatory function are encouraged to attend one of these seminars. Area claims authorities should encourage attendance by all Army and Department of Defense Activities having a claims office in their geographic area of responsibility. Representatives of medical treatment facilities appointed as "points of contact" or "risk managers" as set forth in USARCS BULLETIN 1–79 should be encouraged to attend.

4. Reservations for the seminars must be made with the Point of Contact, USARCS, Mrs. Audrey E. Slusher, Autovon 923-7622/7960 or Commercial 301-677-7622/7960 NLT 15-February 1981.

2. TJAGSA CLE Courses

February 2–5: 10th Environmental Law (5F–F27).

February 2–Apr 3: 95th Basic Course (5–27–C20).

February 9–13: 9th Defense Trial Advocacy (5F–F34).

February 18–20: 3d CITA Workshop (TBD).

February 23–27: 2nd Prosecution Trial Advocacy (5F–F32).

March 2–6: 20th Federal Labor Relations (5F–F22).

March 9–20: 87th Contract Attorneys (5F–F10).

April 6–10: 59th Senior Officer Legal Orientation (5F–F1).

April 13–14: 3d U.S. Magistrate Workshop (5F–F53).

April 27–May 1: 11th Staff Judge Advocate Orientation (5F–F52).

May 4–8: 60th Senior Officer Legal Orientation (Army War College) (5F–F1).

May 4–8: 3d Military Lawyer's Assistant (512–71D20).

May 11–15: 1st Administrative Law for Military Installations (TBD).

May 18–June 5: 22nd Military Judge (5F–F33).

June 1–12: 88th Contract Attorneys (5F–F10).

June 8–12: 61st Senior Officer Legal Orientation (5F–F1).

June 15–26: JAGSO Reserve Training.

July 6–17: JAGC RC CGSC

July 6–17: JAGC BOAC (Phase IV).

July 20–31: 89th Contract Attorneys (5F–F10).

July 20–August 7: 23d Military Judge Course (5F–F33).

August 3–October 2: 96th Basic Course (5–27–C20).

August 10–14: 62nd Senior Officer Legal Orientation (5F–F1).

August 17–May 22, 1982: 30th Graduate Course (5–27–C22).

August 24–26: 5th Criminal Law New Developments (5F–F35).

September 8–11: 13th Fiscal Law (5F–F12).

September 21–25: 17th Law of War Workshop (5F–F42).

September 28–October 2: 63d Senior Officer Legal Orientation (5F–F1).

3. Civilian Sponsored CLE Courses

April

2: AICLE, Probate Practice, Florence, AL.

2–3: PLI, Drafting Documents in Plain Language, New York City, NY.

3: GICLE, Law for the Business Lawyer, Atlanta, GA.

3: AICLE, Probate Practice, Birmingham, AL.

3–4: PLI, Pre-Trial Tactics & Tech. Pers. Injury, Chicago, IL.

9: AICLE, Probate Practice, Dothan, AL.

9–10: PLI, Employee Benefits, New York City, NY.

9–10: ALIABA, Federal Civil Practice & Litigation, Houston, TX.

9–10: FBA, Indian Law Conference, Phoenix, AZ.

10: GICLE, Law for the Business Lawyer, Albany, GA.

10: AICLE, Probate Practice, Montgomery, AL.

10–11: PLI, Personal Injury Trial, New York City, NY.

11: LSB, Family Law, New Orleans, LA.

17: AICLE, Trial Institute, Birmingham, AL.

22–24: PLI, Fundamental Concepts of Corporate Taxation, San Francisco, CA.

23–25: GICLE, Real Property Law, Sea Palms, GA.

24–25: AICLE, Corporate Law Institute, Point Clear, AL.

26–5/1: NJC, Perceiving Stereotypes in Court—Specialty, Reno, NV.

26–5/1: NCDA, Trial Advocacy, Boston, MA.

26–5/15: NJC, General Jurisdiction—General, Reno, NV.

30–5/1: SLF, Wills/Probate Institute, Dallas, TX.

30: FBA, Government Contracts Litigation, Washington, DC.

30: GICLE, Small Estate Planing, Columbus, GA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

AICLE: Alabama Institute for Continuing Legal Education, Box CL, University, AL 36486.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, 20 Garden Street, Cambridge, MA 02138.

BCGI: Brandon Consulting Group, Inc., 1775 Broadway, New York, NY 10019.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuch Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GCP: Government Contracts Program, George Washington University Law Center, Washington, DC.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65101.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachuestts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.

NCCDL: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, University of Minnesota Law School, Minneapolis, MN 55455.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TBI: The Bankruptcy Institute, P.O. Box 1601, Grand Central Station, New York, NY 10017.

UDCL: University of Denver College of Law, 200 West 14th Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Videocassettes Available from TJAGSA

1. JAG Conference Videocassettes

Television Operations of The Judge Advocate General's School announces that videocassettes of the 1980 Army Judge Advocate General's Conference, held 14 through 17 October 1980, are available, in color, to the field. Listed below are titles, running times and guest speakers. If you desire any of these programs, please send a blank ¾ inch videocassette of the appropriate length to The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

Tape #	*TITLE*	*RUNNING TIME*
1	*STATE OF THE JAG CORPS* Speaker: Major General Alton H. Harvey, The Judge Advocate General.	55:50
2	*PP&TO REPORT* Speaker: Lieutenant Colonel Ronald P. Cundick, Chief, PP&TO, OTJAG.	31:00
3	*NCO/ENLISTED REPORT* Speaker: Sergeant Major John H. Nolan, OTJAG.	13:00
4	*GUEST SPEAKER* Major General R. Dean Tice, Deputy Assistant Secretary Military Personnel Policy, OASD (M, R, A, & L)	53:00
5	*MILITARY RULES OF EVIDENCE* Speaker: Major Lee D. Schinasi, Instructor, Criminal Law Division, TJAGSA.	48:00
6	*4TH AMENDMENT PRACTICE* Speaker: Major Stephen A. J. Eisenberg, Senior Instructor, Criminal Law Division, TJAGSA.	45:00
7	*JUVENILE DELINQUENCY/CHILD ABUSE* Speaker: Major Dewey E. Helmcamp, III, Instructor, Administrative & Civil Law Division, TJAGSA.	46:00
8	*MILITARY LAW REPORT* Speaker: Brigadier General Hugh R. Overholt, Assistant Judge Advocate General, Military Law.	41:00
9	*ARMY LAW LIBRARY SERVICE* Speaker: Major Michael A. Haas, Combat Developments Officer, Developments, Doctrine & Literature Department, TJAGSA.	14:00

Tape #	*TITLE*	*RUNNING TIME*
10	*USAREUR PERSPECTIVE OF SELECTED PROBLEMS* Speaker: Brigadier General Wayne E. Alley, The Judge Advocate, U.S. Army Europe and Seventh Army.	38:00
11	*CITA—PART A* Speaker: Major James H. Rosenblatt, Instructor, Contract Law Division, TJAGSA.	48:00
12	*CITA—PART B* Speakers: Major Philip F. Koren, Major Bryan H. Schempf, and Major Joel R. Alvarey, Instructors, Administrative and Civil Law Division, TJAGSA.	47:00
13	*RESERVE COMPONENTS UPDATE* Speakers: Lieutenant Colonel Jack H. Williams, Director, Reserve Affairs Department, and Colonel William L. Carew, Deputy Director, Reserve Affairs Department, TJAGSA.	52:00
14	*LORE OF THE CORPS* Speaker: Major H. Wayne Elliott, Instructor, International Law Division, TJAGSA.	54:00
15	*TAJAG REMARKS* Speaker: Major General Hugh J. Clausen, The Assistant Judge Advocate General.	17:00
16	*LEGAL ASSISTANCE* Speakers: Major Joseph C. Fowler, Jr., and Major Joel R. Alvarey, Instructors, Administrative and Civil Law Division, TJAGSA.	47:00
17	*MACOM AND SELECTED GROUP MEETINGS* Speaker: Colonel James F. Thornton, Jr., Staff Judge Advocate, TRADOC.	22:00
18	*DOJ SPEAKER* Mr. John Shenefield, Associate Attorney General, United States.	50:00
19	*CIVIL LAW REPORT* Speaker: Brigadier General Richard J. Bednar, Assistant Judge Advocate General, Civil Law.	26:00
20	*GUEST SPEAKER* Mr. Togo D. West, Jr., General Counsel, Department of Defense.	49:00
21	*CLOSING REMARKS* Speaker: Major General Alton H. Harvey, The Judge Advocate General.	6:00

2. New Video Tapes Available

Television Operations of The Judge Advocate General's School announces the following videotape programs are available. If you desire any of these programs, please send a blank ¾ inch videocassette of the appropriate length to The Judge Advocate General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

CONTRACT LAW

Number	*Title/Speaker*	*Running Time*
12TH FISCAL LAW COURSE (4-7 November 1980)		
JA-126-1	*ANTI-DEFICIENCY ACT, PART I* Speaker: Lieutenant Colonel Daniel A. Kile, Chief, Contract Law Division, TJAGSA.	50:00
JA-126-2	*ANTI-DEFICIENCY ACT, PART II* A continuation of JA-126-1.	48:00
JA-126-3	*ANTI-DEFICIENCY ACT, PART III* A continuation of JA-126-1 and JA-126-2.	50:00
JA-126-4	*OBLIGATION OF APPROPRIATIONS, PART I* Speaker: Major James H. Rosenblatt, Instructor, Contract Law Division, TJAGSA.	48:00
JA-126-5	*OBLIGATION OF APPROPRIATIONS, PART II* A continuation of JA-126-4.	49:00
JA-126-6	*OBLIGATION OF APPROPRIATIONS, PART III* A continuation of JA-126-4 and JA-126-5.	49:00
JA-126-7	*OBLIGATION OF APPROPRIATIONS, PART IV* A continuation of JA-126-4 thru JA-126-6.	52:00
JA-126-8	*OBLIGATION OF APPROPRIATIONS, PART V* A continuation of JA-126-4 thru JA-126-7.	55:00
JA-126-9	*REVOLVING FUNDS* Speaker: Major James H. Rosenblatt, Instructor, Contract Law Division, TJAGSA.	44:00
JA-126-10	*MULTI-YEAR FUNDS* Speaker: Major James H. Rosenblatt, Instructor, Contract Law Division, TJAGSA.	45:00
JA-126-11	*MINOR CONSTRUCTION AND FAMILY HOUSING (DOD ONLY, PART I* Speaker: Lieutenant Colonel Daniel A. Kile, Chief, Contract Law Division, TJAGSA.	56:00
JA-126-12	*MINOR CONSTRUCTION AND FAMILY HOUSING (DOD ONLY), PART II*	48:00
CRIMINAL LAW		
4TH CRIMINAL LAW NEW DEVELOPMENTS COURSE (25-27 August 1980)		
JA-350-1	*MILITARY RULES OF EVIDENCE, PART I* Speaker: Major Lee D. Schinasi, Instructor Criminal Law Division, TJAGSA.	49:00
JA-350-2	*MILITARY RULES OF EVIDENCE, PART II* A continuation of JA-350-1.	47:00

Number	*Title/Speaker*	*Running Time*
JA-350-3	*MILITARY RULES OF EVIDENCE, PART III* A continuation of JA-350-1 and JA-350-2.	38:00
JA-350-4	*MILITARY RULES OF EVIDENCE, PART IV* A continuation of JA-350-1 thru JA-350-3.	51:00
JA-350-5	*FOURTH AMENDMENT* Speaker: Major Stephen A. J. Eisenberg, Senior Instructor, Criminal Law Division, TJAGSA.	52:00
JA-350-6	*MOTIONS* Speaker: Major Owen D. Basham, Senior Instructor, Criminal Law Division, TJAGSA.	42:00
JA-350-7	*POTPOURRI, PART I* (Criminal Law Faculty) Confinement—Major Lee D. Schinasi Sentencing—Captain Larry R. Dean Crimes and Defenses—Captain Richard Gasperini	42:00
JA-350-8	*POTPOURRI, PART II* (Criminal Law Faculty) Arguments—Major Owen D. Basham Prosecutorial Discretion—Major Stephen Eisenberg SJA Review—Captain Joseph E. Ross	40:00
JA-350-9	*POTPOURRI, PART III* (Criminal Law Faculty) Verdi Issues—Lieutenant Colonel Herbert Green ALEF Issues—Captain Glen D. Lause Nonjudicial Punishment—Major David Schlueter	50:00
JA-350-10	*FIFTH AMENDMENT* Speaker: Major David A. Schlueter, Instructor, Criminal Law Division, TJAGSA.	44:00
JA-350-11	*GUEST SPEAKER, PART I* Honorable Robinson O. Everett, Chief Judge, U.S. Court of Military Appeals.	50:00
JA-350-12	*GUEST SPEAKER, PART II* A continuation of JA-350-11.	14:00
JA-350-13	*INSANITY* Speaker: Captain Joseph E. Ross, Instructor, Criminal Law Division, TJAGSA.	42:00
JA-350-14	*SIXTH AMENDMENT* Speaker: Major Richard H. Gasperini, Instructor, Criminal Law Division, TJAGSA.	49:00
JA-350-15	*JURISDICTION* Speaker: Major David A. Schlueter, Instructor, Criminal Law Division, TJAGSA.	43:00

Number	*Title/Speaker*	*Running Time*
JA-350-16	*PROCEDURE* Speakers: Captain Glen D. Lause and Captain Joseph E. Ross, Instructors, Criminal Law Division, TJAGSA.	46:00
INTERNATIONAL LAW		
JA-447	*INTERNATIONAL LAW: PROBLEMS AND PROSPECTS* Guest Speaker: Mr. Louis G. Fields, Office of the Legal Advisor, U.S. Department of State.	37:00

Number	*Title*	*Running Time*
	MILITARY RULES OF EVIDENCE ROADSHOW (March 1980)	
1	RECENT DEVELOPMENTS IN MILITARY JUSTICE—RULES 101-404	50:41
2	RULES OF EVIDENCE 407-412 SECTION 9: 901-912 SECTION 7: 701-796 SCIENTIFIC EVIDENCE—POLYGRAPHS	43:00
3	JUDICIAL NOTICE, PRIVILEGES, CONFIRMING CHANGES	48:00
4	INTRODUCTION TO SECTION 3: RULES 301-303	57:00
5	RULES OF EVIDENCE 304	52:00
6	RULES OF EVIDENCE 305-306	34:00
7	RULES OF EVIDENCE 311-313	52:00
8	RULES OF EVIDENCE 314-317	25:00
9	RULES OF EVIDENCE 1001-1008, 801-803(5)	48:00
10	RULES OF EVIDENCE 803(6)-806, 601-606	56:00
11	RULES OF EVIDENCE 607-615	30:00

OBSOLETE VIDEOTAPES. Videotape programs listed below have been determined obsolete.

CONTRACT LAW	
JA-121-4 thru JA-121-8	OBLIGATION OF APPROPRIATIONS, PARTS I, II, III, IV, & V
JA-121-9 and JA-121-10	MINOR CONSTRUCTION AND FAMILY HOUSING (DOD RELATED), PARTS I and II
JA-121-11	REVOLVING FUNDS
JA-121-12	MULTI-YEAR FUNDING
CRIMINAL LAW	
JA-314	TRIAL BY MILITARY JUDGE ALONE
JA-343 Series	3RD CRIMINAL LAW NEW DEVELOPMENTS COURSE (5-7 Sep 79)

Current Materials of Interest

1. Book Review

Sherrer, The Unsolicited Proposal, 36 Journal of the Missouri Bar 385, September, 1980.

Publisher's address: The Missouri Bar, 326 Monroe Street, Jefferson City, Missouri 65101.

2. Regulations

NUMBER	*TITLE*	*CHANGE*	*DATE*
AR 27-10	Military Justice	I01	20 Oct 80
AR 55-46	Travel of Dependents and Accompanied Military and Civilian Personnel To, From, or Between Overseas Areas	901	31 Oct 80
AR 135-91	Service Obligations, Methods of Fulfillment, Participation Requirements and Enforcement Procedures	902	27 Nov 80
AR 135-155	Promotion of Commissioned Officers and Warrant Officers Other than General Officers	904	15 Oct 80
AR 135-178	Separation of Enlisted Personnel	901	27 Nov 80
AR 140-10	Assignments, Attachments, Details, and Transfers	3	1 Oct 80
AR 190-53	Interception of Wire and Oral Communications for Law Enforcement Purposes	901	1 Oct 80
AR 210-6	Bachelor Housing Management	I02	1 Oct 80
AR 230-65	Non-Appropriated Funds and Accounting and Budgeting Procedures	901	1 Oct 80
AR 340-17	Release of Information and Records From Army Files	902	28 Oct 80
AR 340-17	Release of Information and Records from Army Files	903	27 Nov 80
AR 340-21	The Army Privacy Program	3	1 Nov 80
AR 360-1	Community Relations		15 Oct 80
AR 600-9	Army Physical Fitness and Weight Control Program	901	15 Oct 80
AR 630-10	Absence Without Leave and Desertion	901	7 Nov 80
AR 600-20	Army Command Policy and Procedures		15 Oct 80
AR 600-31	Suspension of Favorable Personnel Actions for Military Personnel in National Security Cases and Other Investigations or Proceedings	901	28 Nov 80
AR 600-33	Line of Duty Investigations	1	15 Oct 80
AR 600-37	Unfavorable Information	Basic	15 Nov 80
AR 600-200	Enlisted Personnel Management System	916	19 Oct 80
AR 600-200	Enlisted Personnel Management System	917	10 Nov 80
AR 601-280	Army Reenlistment Program	910	15 Nov 80
AR 623-105	Officer Evaluation Reporting System	902	28 Nov 80
AR 635-100	Officer Personnel	901	7 Nov 80

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AR 635-100	Officer Personnel	902	28 Nov 80
AR 635-120	Officer Resignations and Discharges	901	7 Nov 80
AR 635-200	Enlisted Personnel	902	28 Nov 80
AR 640-3	Identification Cards, Tags and Badges	I02	27 Oct 80
AR 710-2	Material Management for Using Units, Support Units, and Installations	6	1 Oct 80

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Major General, United States Army
The Adjutant General